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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1701

JIM ROSE, WARDEN,
Petitioner,

vs.

JAMES E. MITCHELL and
JAMES NICHOLS, JR.,
Respondents.

## PETITION FOR WRIT OF CERTIORARI

**To the United States Court of Appeals for the Sixth Circuit**

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**To the United States Court of Appeals for the Sixth Circuit**

Petitioner, Jim Rose, Warden, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit rendered in this proceeding on January 9, 1978, wherein the Court of Appeals reversed the United States District Court and issued writs of habeas corpus for the respondents, two prisoners incarcerated by the State of Tennessee.

## OPINIONS BELOW

The memorandum opinion of the United States Court of Appeals for the Sixth Circuit was rendered on January 9, 1978, is reported as *Mitchell v. Rose*, 570 F.2d 129 (6th Cir. 1978), and is attached hereto as Appendix A.

This case arose as separate petitions for federal habeas corpus relief in the United States District Court for the Western District of Tennessee, Western Division. In the district court these cases were originally styled: *Mitchell v. Rose, Warden*, Civil C-75-222, and *Nichols v. Rose, Warden*, Civil C-75-265. On February 17, 1976, an order was entered by the district court, dismissing most issues raised in the petitions. A copy of this order is attached hereto as Appendix D. On February 17, 1977, another order was entered by the district court dismissing the remaining claims and entering judgment for the state. A copy of this memorandum and order is attached hereto as Appendix C. On March 23, 1977 a further order was entered by the district court denying a motion for amendment and stating further grounds for the court's decision. A copy of this order is attached hereto as Appendix B. The memorandum decisions and orders of the district court are not reported.

The opinion of the Tennessee Court of Criminal Appeals, affirming the conviction of Mitchell and Nichols, was filed on June 5, 1974; and a copy is attached hereto as Appendix F. This opinion is not reported. The Supreme Court of Tennessee denied certiorari on March 10, 1975. A copy of that court's order is attached hereto as Appendix E.

## GROUNDS ON WHICH JURISDICTION IS INVOKED

The opinion and judgment of the Court of Appeals for the Sixth Circuit was entered on January 9, 1978. The state's petition to rehear was denied by order of that Court filed on March 30, 1978. This petition is timely filed within ninety (90) days of that date. Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).



## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

Habeas corpus is codified in Title 28, United States Code, which provides in pertinent part:

**§ 2241. Power to grant writ:**

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdiction . . .

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(3) He is in custody in violation of the Constitution or laws or treaties of the United States . . ."

**§ 2254. State custody; remedies in Federal courts:**

. . . .

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in

custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for



hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

Tennessee Code Annotated provides in pertinent part as follows:

**40-1506. Appointment and term of foreman or forewoman.**—Judges having criminal jurisdiction in any county, are authorized, and required to appoint the foremen or forewomen of the grand juries in the counties of their respective jurisdictions; and said foremen or forewomen shall hold office and exercise their powers for a term of two (2) years from appointment, unless for good cause, in the discretion of the presiding judge, he may be removed, relieved, or excused from office at any time. Said foreman or forewoman shall be the thirteenth member of each grand jury organized during his term of office, having equal power and authority in all matters coming before the grand jury with the other members thereof. [Acts 1919, ch. 37, § 1; Shan. Supp., § 5832a1; mod. Code 1932, § 10026; Acts 1976 (Adj. S.), ch. 383, § 1.]

*Amendments.* The 1976 amendment inserted the words "or forewomen" each place they appear and in the last sentence inserted "or forewoman."

**40-1507. Qualifications of foreman or forewoman.**—Every person appointed as a foreman or forewoman of the grand jury under § 40-1506 shall be at least twenty-five (25) years of age, and shall be a good and lawful man or woman, possessing all the qualifications of a juror. Provided that no justice of the peace shall be eligible for appointment as foreman or forewoman of the grand jury. the provision of this section requiring that no justice of the peace shall be eligible for appointment as foreman or forewoman of the grand jury shall not apply in those

counties where arraignment in criminal cases is had exclusively before general sessions court. [Acts 1919, ch. 37, § 2; Shan. Supp., § 5832a2; Code 1932, § 10027; Acts 1957, ch. 252, §§ 1, 2; 1976 (Adj. S.), ch. 383, § 2.]

**40-1510. Duties of foremen or forewomen.**—It shall be the duty of such foremen or forewomen of grand juries to assist and cooperate with the district attorney in ferreting out crime, to the end that the laws may be faithfully enforced, and such foremen or forewomen are directed out of term to advise the district attorney with respect to law violations and furnish him names of witnesses, whom the district attorney may, if he deem proper, order summoned to go before the grand jury at the next term. In term time, the foreman or forewoman may order the issuance of subpoenas for witnesses to go before the grand jury, unless otherwise ordered by the district attorney. [Acts 1919, ch. 37, § 4; Shan. Supp., § 5832a4; Code 1932, § 10029; Acts 1976 (Adj. S.), ch. 383, § 5.]

**40-1706. Concurrence in true bill.**—An indictment cannot be found without the concurrence of at least twelve (12) grand jurors, and, when so found, shall be indorsed "A true bill," and the indorsement signed by the foreman. [Code 1858, § 5093; Shan., § 7055; Code 1932, § 11600.]

## QUESTIONS PRESENTED

1. Whether Discrimination in the Selection of the Non-Voting Foreman of the Grand Jury Is a Basis Upon Which a State Prisoner May Be Granted Federal Habeas Corpus Relief When the Subsequent Trial Is Free of Reversible Constitutional Error, When There Has Been No Demonstration of Actual Prejudice and There Is No Rational Basis to Presume Prejudice, and When the State Has Provided an Opportunity for Full and Fair Litigation of the Claim?



2. Whether the Decision of the Court of Appeals Comports With the Clearly Erroneous Standard and With This Court's Decisions Interpreting the Equal Protection Clause?

3. Whether, Assuming Arguendo, Systematic Exclusion of Blacks From the Post of Grand Jury Foreman in Tipton County, the Doctrine of Harmless Error Can Be Applied, When There Has Been No Actual Prejudice and No Rational Basis Exists Upon Which to Presume Prejudice?

## STATEMENT OF THE CASE[1]

On October 28, 1972 Claudie Greer and William Nabors were murdered by the respondents during an armed robbery of a cafe[2] in Tipton County, Tennessee. The respondent Nichols began the criminal episode by pistol-whipping a customer. Then Nichols, wielding two pistols, forced the proprietor to hand over about five or six hundred dollars. Nichols also took other money from the proprietor and customers in the cafe. Then, for no apparent reason, Nichols fired several shots into the back room of the cafe and fled. Eyewitnesses testified that Claudie Greer, standing in the back room, fell and subsequently died after the shots were fired from the front room. Proof later showed that Greer was killed by a shot from a .38 caliber pistol.

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[1] Unless otherwise indicated, the references contained within this statement are to pages of the state court record. The state court record was before both the federal courts below.

[2] The race of the defendants, the victims, or the eye-witnesses was, of course, not an issue at trial. However, since the Court of Appeals has found racial discrimination and presumed prejudice, the race of these people is perhaps relevant here to demonstrate the total absence of prejudice and the lack of any evidence showing discriminatory intent. The only evidence of race appears in Volume II, page 87 of the trial where on redirect examination the cafe's proprietor testified he is black and black customers comprised almost 100 per cent of his business. There is nothing in the record to support any conclusion except that the victims and witnesses were also black.

Simultaneously, the co-respondent James Mitchell, armed with a sawed-off shot gun, was in the process of robbing persons in the back room. William Nabors was among these people. When Nabors bent over to pick up some change from the floor, Mitchell shot him through the mouth with the sawed-off shot gun, ending his life. Mitchell then went into the front room, took more money from the proprietress and also fled.

The next day Mitchell and Nichols were arrested together in Memphis in the apartment of Nichols' girlfriend. A .38 caliber pistol was recovered from Nichols at the time of his arrest, and a ring taken during the robbery was found at the scene of arrest. A sawed-off shot gun and blood splattered clothing were then found in the apartment of Mitchell's girlfriend. After his arrest, Mitchell gave a confession to members of the Memphis Police Department.

Nichols and Mitchell were jointly indicted in two indictments on November 6, 1972. The grand jury was composed of twelve jurors, one of them was a black woman, and one acting foreman. The regular foreman of the grand jury was unavailable and the trial judge chose a former foreman as his substitute. The former foreman was chosen to serve by the trial judge because he had previously served as a regular foreman, had previously served as an acting foreman, had been willing to perform in the past, and according to the judge's experience had always served well.[3] Although some twenty (20) witnesses were scheduled to testify before the grand jury, the grand jurors unanimously voted to indict the respondents after hearing one police officer testify. The testimony of the officer primarily consisted of recounting Mitchell's confession. This witness did not mention the race of the respondents and this fact was not known to either the acting foreman or the other members of the grand

[3] *See* Affidavits submitted by the state trial judge and the acting foreman. These affidavits formed part of the state's response in the U.S. District Court and were also before the Court of Appeals.



jury.[4] The acting foreman did not vote on the indictment because of the unanimity, but he did sign the indictment, as is required by Tennessee law. (T.C.A. § 40-1706).

Prior to trial, the petitioners filed a plea in abatement asking for dismissal of the indictment and alleging the grand jury and foreman were selected in a constitutionally offensive manner. (p. 21). On March 13, 1973 an evidentiary hearing was held in state court. At that hearing, three jury commissioners of Tipton County, three former foremen of the Tipton County Grand Jury, the entire grand jury which indicted the petitioners, and the circuit court clerk of Tipton County all testified. All witnesses were subject to full examination by counsel for the respondents. The proof elicited demonstrated the plea in abatement was without merit. There was a total lack of countervailing evidence. The state court overruled the plea in abatement.

Trial was held on March 21 and March 22 of 1973 in the Circuit Court of Tipton County. The state introduced the testimony of five eyewitnesses who identified Nichols and five eyewitnesses who identified Mitchell as the murderers. (pp. 65, 70, 90, 92, 98, 126, 131, 142, 143, 211, 242, 243, 244, 255, 266, 282). In addition, a redacted version of Mitchell's confession was introduced. Proof showed the recovery of the murder weapons from the respondents and showed that a ring stolen during the crime was recovered from the scene of arrest. The defense proof consisted almost wholly of a testimonial denial by Nichols of any participation. The jury found both respondents guilty of first degree murder and sentenced them to sixty years incarceration on each count. (pp. 357-360).

The respondents appealed their convictions first to the Tennessee Court of Criminal Appeals where they made some twelve assignments of error including assignments attacking the com-

[4] *See* Affidavit of acting foreman and Volume I of the state record, which contains the testimony on the plea in abatement.

position of the grand jury and the selection process for grand jury foreman. In a unanimous opinion, the Court of Criminal Appeals affirmed the convictions and found, "the facts here do not demonstrate a systematic exclusion of Negroes upon racial grounds". (See Appendix F) The Supreme Court of Tennessee denied certiorari. (See Appendix E).

The respondents' resort to the federal court system began as separate applications for federal habeas corpus relief in the United States District Court for the Western District of Tennessee, Western Division. The initial petitions for habeas corpus relief each included some eleven grounds. In the district court, the cases were consolidated and twice referred to the magistrate for report. The state filed four separate responses, the entire state trial transcript, and affidavits from the state trial judge and the acting foreman of the indicting grand jury. After reviewing the first state response, the state trial court record, and the first report on reference, the district judge, on February 17, 1976, dismissed all claims except the selection issues and a *Bruton* issue. (*See* Appendix D). On these issues, the district court ordered further response and another reference to the magistrate. On February 17, 1977, by memorandum and order, the district court found the *Bruton* violation to be harmless beyond a reasonable doubt and further found that the acting foreman was selected for other than racial reasons. The petitions were dismissed. (*See* Appendix C). A final order denying a motion to amend judgment was entered by the district court on March 23, 1977. (*See* Appendix B).

The respondents appealed to the Court of Appeals for the Sixth Circuit which reversed the district court on January 9, 1978. (*See* Appendix A). The Court of Appeals found discrimination in the selection of the grand jury foreman in Tipton County, and set aside the convictions. The state is ordered to reindict the respondents in sixty (60) days or release them.



## REASONS FOR GRANTING THE WRIT

The Sixth Circuit Court of Appeals for the Sixth Circuit has voided two state first degree murder convictions obtained more than five years ago. The Sixth Circuit's decision is based on a finding that the non-voting acting foreman of the indicting grand jury was selected in a discriminatory manner. The Sixth Circuit has granted federal habeas corpus relief to the respondents despite a record which demonstrates that:

1. The race of the respondents was unknown to either the acting foreman or other members of the grand jury;

2. the grand jury contained a black woman, who testified in state court and established the total absence of any racial consideration;

3. the regular foreman was unavailable and a former foreman was picked by the trial judge to replace him selely because the trial judge knew of his demonstrated ability, his willingness to serve, and his availability;

4. the acting foreman did not vote on the indictment because of the grand jury's unanimity;

5. although some twenty witnesses were scheduled, the grand jury unanimously voted for indictment after hearing one witness;

6. the selection of the grand jury itself is an issue previously resolved in favor of the state;

7. the subsequent trial was without reversible constitutional error and the petit jury was not an issue;

8. the evidence against respondents at trial included five eyewitness identifications for each, a confession, recovery of the murder weapons from the respondents, and other physical evidence; and

9. the issue of grand jury foreman selection was fully and fairly litigated in state court.

More simply stated, the Sixth Circuit has granted federal habeas corpus relief on the basis of perceived error occurring during the now moot accusatorial stage. The relief has been granted without a demonstration of prejudice and upon a record which can not support any reasonable presumption of prejudice. The relief was granted after three state courts had denied relief, and the district court had dismissed the petitions without an evidentiary hearing. The Sixth Circuit's grant of federal habeas corpus relief is contrary to the recent decisions of this Court interpreting the substantive scope of the writ. The issuance of the writ of habeas corpus in this case is contrary to the historical and meaningful purposes of the writ. The record demonstrates with unmistakable clarity that there is no unconstitutional deprivation of liberty. Furthermore, any incremental remedial benefit to the system is clearly outweighed by the cost to the system and society. Such benefit is available through other means, at much less cost. The criminal justice system suffers when the writ of habeas corpus issues solely as a remedial device when no real question of possible innocence exists.

The decision of the Sixth Circuit is a departure from the acceptable and usually applied clearly erroneous standard, which controls an appellate court's review in habeas corpus.

The decision of the Sixth Circuit has cast grave doubt upon the continued viability of Tennessee's system for selecting grand jury foremen or forewomen, a system essentially similar to those used in other states. The Sixth Circuit's rejection of the pragmatic reasons for the selection of the acting foreman here imposes a standard which can only be met by a random selection system or a system of affirmative action. Key man systems must either remove all discretion or install a conscious affirmative action policy. The Sixth Circuit has, in effect, held that a prima



facie case, built on questionable statistics, can not be rebutted by a plausible, non-racially motivated explanation. This is contrary to the decisions of this Court interpreting the Equal Protection Clause.

The Writ of Certiorari should be granted to enable this Court to review the substantive scope of federal habeas corpus; to allow this Court to remedy the errors relating to the clearly erroneous standard and the Equal Protection Clause; and finally, so that this Court may decide whether the harmless error doctrine should apply.

## ARGUMENT

### I

**State Prisoners Should Not Be Granted Federal Habeas Corpus Relief on a Claim Questioning the Selection of the Non-Voting Foreman of Their Grand Jury When Their Subsequent Trial Is Free of Reversible Constitutional Error, When There Has Been No Demonstration of Actual Prejudice and There Is No Rational Basis to Presume Prejudice, and When the Claim Has Been Fully and Fairly Litigated in State Court.**

The Great Writ, habeas corpus ad subjiciendum, has deservedly enjoyed a prestigious place in the history of Anglo-American jurisprudence. Elaborate and scholarly discussions of the Great Writ and its evolvement can be found in the decisions of this Court and other legal writings. *See Fay v. Noia*, 372 U.S. 391, 399-426, 449-463 (1963); *Prieser v. Rodriguez*, 411 U.S. 475, 484-487 (1973); *Stone v. Powell*, 428 U.S. 465, 96 S. Ct. 3037, 3042-3046 (1976); "Developments in the Law—Federal Habeas Corpus," 83 *Harv.L.Rev.* 1038, 1042-62, 1263-74 (1970); Oakes, "Legal History in the High Court—Habeas Corpus," 64 *Mich.L.Rev.* 451-68 (1966); Bator, "Finality in

Criminal Law and Federal Habeas Corpus for State Prisoners," 76 *Harv.L.Rev.* 441, 463-507 (1963). As Mr. Justice Powell wrote in *Schneckloth v. Bustamonte*, 412 U.S. 218, 255-56 (1973):

> Much, of course, has transpired since that first Habeas Corpus Act (citations omitted). The scope of federal habeas corpus for state prisoners has evolved from a quite limited inquiry into whether the committing state court had jurisdiction (citations omitted), to whether the applicant had been given an adequate opportunity in state court to raise his constitutional claims (citation omitted); and finally to actual redetermination in federal court of state court rulings on a wide variety of constitutional contentions (citation omitted).

The noble purpose of the Great Writ was and should remain to determine whether a violation of a personal constitutional right has resulted in the deprivation of liberty. *See Fay v. Noia*, 372 U.S. at 423, 424. However, through the years this noble purpose has been joined by other purposes as the substantive scope of the writ was expanded. The expansion has resulted from the employment of the Great Writ to further society's interest in preserving the integrity of the judicial system and implementing minimum constitutional standards within the nation's criminal justice system. Society's interests have been fostered by this expansion, but the issue of undeserved or unjust incarceration has become almost secondary. In fact, since this Court's decision in *Fay v. Noia*, federal habeas corpus relief has, in reality, been a continuation of the state appellate process. Society's interests now demand a reconsideration of the applicability of this form of relief to constitutional errors preceding the trial which have no real relationship to the deprivation of liberty. The issuance of the writ should again depend primarily on a relationship between constitutional error and deprivation of liberty. This case presents a classic situation for this Court to



consider whether moot pre-trial questions which do not affect the integrity of the trial are cognizable on federal habeas corpus.

In the landmark decision of *Stone v. Powell, supra*, (1976), this Court held "that where the state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial."[5] The proposition here put forth is that the rational of *Stone* should extend beyond cases involving Fourth Amendment claims and should encompass a case such as the one sub judice, where a constitutional infirmity[6] occurs during the accusatory stage of the criminal process and has been mooted by the subsequent trial and conviction. This very extension of the doctrine and philosophy of *Stone* was expressly recognized by the district court in the instant case. In the post-decision order of March 23, 1977, Chief Judge Brown stated:

> Since this court made the determination that this contention be dismissed, our determination is further supported by the decision of the Supreme Court of the United States in *Stone v. Powell*, — U.S. —, 49 L. Ed. 2d 1067 (1976). As we read that decision, where the claim of constitutional error does not go to the integrity of the fact finding process so far as the conviction is concerned, if the petitioner received a full and fair hearing in state court as to his claim, the federal court will not review the determination by the state court. Thus, not only have we found the decision in the state court to be correct, but also it

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[5] *Stone*, 96 S. Ct. at 3045, 3046.

[6] This characterization is solely for the purpose of presenting this portion of the petition. No concession of error in the selection process is intended.

> appears that, since the contention was fairly heard in state court petitioners are not entitled to another review here.

(*See* Appendix B-2).

In *Castaneda v. Partida*, 430 U.S. 482 (1977), Mr. Justice Powell, in dissent,[7] specifically recognized "a strong case may be made that claims of grand jury discrimination are not cognizable on federal habeas corpus after *Stone v. Powell* . . ." Mr. Justice Powell explained in *Castaneda* that the rationale of *Stone* is better applied to a case involving a tainted indictment than a case involving the admission of tainted evidence. As stated by Mr. Justice Powell:

> Unlike the prisoner in *Stone*, who could complain that his conviction rested on evidence tainted by Fourth Amendment violations and could ask for a new trial with that evidence excluded, the prisoner in this case challenges only the now moot determination by the grand jury that there was sufficient cause to proceed to trial. He points to no flaw in the trial itself. As in Stone, the incremental benefit of extending habeas corpus as a means of correcting unconstitutional grand jury selection procedures might be viewed as outweighed by the acknowledged costs to other values vital to a rational system of criminal justice.

*See Castaneda*, at 1287, footnote 1.

The matter *sub judice* presents facts more appropriately suited for an application of the *Stone* rationale than the facts before this Court in *Castaneda*. In *Castaneda* the composition of the entire Grand Jury was in question. In this matter, only the

[7] Mr. Justice Powell's dissent was joined by the Chief Justice and Mr. Justice Rehnquist. Mr. Justice Stewart, separately dissenting, stated that he was in substantial agreement with the other dissenting opinions. *Castaneda*, at 1287. The issue of extending the rationale of *Stone*, was not before the Court in *Castaneda*. The issue had not been addressed in the lower courts and was not briefed or argued in this Court.



selection of the non-voting foreman is in question. Furthermore, in *Castaneda* the Mexican-American surname of the defendant is a fact upon which a presumption of prejudice could rest. In the instant matter the evidence demonstrates that the race of respondents was unknown to the grand jury when the indictment was returned.

As indicated in *Castaneda*, there is no peculiar characteristic regarding claims of grand jury selection irregularities which would weigh against an extension of the *Stone* logic beyond the Fourth Amendment. This Court has previously stated federal habeas relief is not automatically available to a state prisoner who pled guilty and later attacked the grand jury selection process, *Tollett v. Henderson*, 411 U.S. 258, 266, 267 (1973). More recently this Court held a state prisoner was not entitled to habeas relief on grand jury selection grounds when he failed to conform with a state requirement that such objections be raised before trial, absent a showing of both cause and actual prejudice. *Francis v. Henderson*, 425 U.S. 536, 542 (1976). Both the result and rationale of *Stone*, *Henderson*, and *Tollett* are inconsistent with the decision of the Sixth Circuit in this case.

The Sixth Circuit has not determined that Tennessee is incarcerating two possibly innocent individuals. Any reasonable man viewing the overwhelming evidence admitted at trial must conclude that retrial will reach the same result if the state can resurrect evidence which is now more than fiveand one-half years old.[8] Therefore, if guilt is unquestioned, if the trial is

[8] This condition is not a small consideration, and is a significant cost factor. Reconstruction of a trial is never a certainty, especially after five and a half years. The cost to society in terms of money is obvious. The cost in other terms is also quite clear. *See, Stone*, 96 S.Ct. at 3050-52; *Schneckloth*, at 259 (Powell, J., concurring) and *Kaufman v. United States*, 394 U.S. 217, 231 (1969) (Black, J., dissenting). Perhaps, the biggest cost is the loss of public confidence in the system. The system has obviously failed when the cost overcomes the benefit. The criminal justice system should not be a game of endurance where guilt or innocence is a secondary consideration.

without reversible flaw, and if there is no basis to reasonably presume any prejudice to respondents from the perceived error, then the rationale supporting the writ's issuance must be remedial. The Sixth Circuit's opinion supports this conclusion: ". . . there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." (*See* Appendix A-7). The result is that a conviction, no matter how overwhelming, can not withstand a pre-trial procedural constitutional error unrelated to the fact finding process. This philosophy is remedial and similar to the rationale which formerly supported federal habeas relief to state prisoners asserting Fourth Amendment claims. Under the mandate of *Stone*, the incremental benefits must be weighed against the substantial societal costs. In this case the costs clearly outweigh the benefit and alternative methods exist for obtaining the benefits at less cost.[9]

## II

**The Sixth Circuit's Decision Does Not Comport With the Clearly Erroneous Standard and Is Contrary to Decisions of This Court Regarding the Equal Protection Clause.**

Tennessee uses the key man system of jury selection. Three jury commissioners are appointed by the trial judge in each county. Following statutory guidelines, these commissioners compile a jury pool from which both grand and petit juries are

[9] *Turner v. Fouche*, 396 U.S. 346 (1970) and *Carter v. Jury Commission*, 396 U.S. 320 (1970) were not habeas cases and demonstrate the benefits can be achieved through class action litigation without much of the cost attendant to habeas corpus proceedings. Other alternatives also exist including criminal sanctions, 18 U.S.C. § 243; and the state remedies which in Tennessee include two levels of appellate review and the state post-conviction law. Tenn. Code Ann. § 40-3801, et sequel. Finally, an individual is entitled to seek the direct review of this Court after a decision of the State Supreme Court.



randomly drawn. *See* Tenn. Code Ann. § 22-223-243 and Tenn. Code Ann. § 40-1501-1505. The grand jury foreman or forewoman.[10] is selected in a different manner. The criminal court judge appoints the foreman for a term of two years. The foreman may be chosen from the general population, must be twenty-five years old, and otherwise qualified to serve on the grand jury. *See* Tenn. Code Ann. §§ 40-1506, 1507. The foreman becomes the thirteenth grand juror and is required by law to sign all true bills. Tenn. Code Ann. § 40-1506, 1706.[11]

The United States Constitution does not guarantee to a state defendant the right to a grand jury. *Hurtado v. California*, 110 U.S. 516 (1884). However, this Court has long held that a criminal defendant is denied equal protection of the law if, as a result of purposeful discrimination, members of his own race are excluded from grand jury service. *Strauder v. West Virginia*, 100 U.S. 303, 309 (1880). The early cases involved absolute exclusion but today the principle is established that substantial under-representation constitutes a constitutional violation, if the cause is purposeful discrimination. *Castaneda*, 97 S.Ct. at 1279; *Turner v. Fouche*, 396 U.S. 346, 359 (1970).

A criminal defendant, in order to prove an equal protection violation in the context of grand jury selection, must first establish that the excluded group is a distinct class, singled out for different treatment under the laws. Next the defendant must prove the degree of under-representation. Finally the defendant must show that the selection procedure is susceptible to abuse. *Castaneda*, 97 S. Ct. at 1280; *Alexander v. Louisiana*, 404 U.S. 625, 630, 632 (1972); *Akins v. Texas*, 325 U.S. 398, 403-404 (1945). If substantial under-representation is demon-

[10] Hereinafter, only the masculine designation will be used. The statute uses both.

[11] Tenn. Code Ann. § 40-1706 requires the concurrence of twelve grand jurors to return a true bill. Although the foreman must sign all true bills, his vote is not necessary to indict.

strated and the other requirements shown, then a prima facie case is made and the burden shifts to the state to rebut the case. *Castaneda*, 97 S. Ct. at 1279; *Alexander*, 405 U.S. at 632; *See also, Whitus v. Georgia*, 385 U.S. 545 (1967).

The method of proving an equal protection violation in the context of grand jury selection is sometimes called the "rule of exclusion." This method of proof may give rise to a presumption of unconstitutional action which will prevail if unrebutted. *Washington v. Davis*, 426 U.S. 229, 241 (1976). However, the essential element of inviduous discriminatory purpose is still required. "The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race." *Washington*, 426 U.S. at 239. A prima facie case fails when the presumption is dispelled by plausible evidence demonstrating the official action was not racially motivated. *Castaneda*, 97 S. Ct. at 1282; *Turner*, 396 U.S. at 361.

There can be no doubt that a Court of Appeals may set aside a district court's findings in a habeas action only if they are clearly erroneous. Fed. Rule Civ. Proc. 52(a), 81(a)(2); *Castaneda v. Partida*, 430 U.S. 482, 97 S. Ct. 1272, 1286 (1977) (Stewart, J. dissenting). The district court below dismissed the foreman selection issue, finding "that the foreman was selected for other than racial reasons. . . ." (Appendix C-2) and "that this issue had been adequately investigated by the state trial judge and his determination that there had been no racial discrimination was correct." (Appendix B-2).[12] These findings can not be said to be clearly erroneous.

Certainly, black people are a distinct class satisfying the first element of proof. Further, the Tennessee system, which

[12] The district judge also based his decision on *Stone v. Powell*, 428 U.S. 465 (1976), as is discussed above. Although not cited in his memoranda, the district judge's decision is also a correct application of 28 U.S.C. 2254(d).



allows the criminal judge to exercise his discretion in selecting a foreman, could be used to discriminate. Therefore, in order to make a prima facie case the respondents were required only to demonstrate substantial under-representation over a significant period of time. The proof on this element is very questionable[13] but was sufficient for the district judge to find a prima facie case. The state responded with two affidavits, from the acting foreman and the trial judge. These affidavits demonstrate with frankness and clarity the solely pragmatic reasons why the foreman was selected. Simply stated, the regular foreman was unavailable so the judge chose a former foreman because of his availability, his willingness, his experience, and his demonstrated ability. The reasons for selection are very credible and demonstrate a responsible and natural course of human action which is wholly void of racial consideration. The district court so found and this finding can not be said to be clearly erroneous.

The decision of the Sixth Circuit is contrary to a long, unbroken line of decisions by this Court requiring proof of in-

[13] The opinion of the Sixth Circuit is very misleading on a number of points relating to the evidence adduced by respondents, the rebuttal evidence, and the procedure below:

(a) First, there was no hearing of any kind in district court in this case. All references in the opinion to a "hearing" are to the hearing in state court on the plea in abatement. The transcript of this hearing was before the federal courts.

(b) Second, the opinion states "There has never been a black foreman or forewoman in Tipton County according to the recollections of the trial judge, three jury commissioners, and three former foremen". (*See* Appendix A-5, A-6). In fact, the record shows that the three jury commissioners never testified on this issue whatsoever, and the trial judge's affidavit does speak to his recollection but only to the present. (*See*, state record, Vol. I, pp. 55-71). Therefore, the total evidence of substantial underrepresentation is drawn from the testimony of three foremen. One had only served for two years in the early seventies. One served "5 or 6 years" in the early sixties. The third served "several years" in the fifties. Two of them had also substituted. These recollections form the whole proof of underrepresentation. (*See*, state record, Vol. I, pp. 71-82).

tentional discrimination to sustain an equal protection claim. *See Castaneda*, 97 S. Ct. at 1279; *Washington*, 426 U.S. at 239; *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977); *Turner*, 396 U.S. at 361; and *Carter v. Jury Commissioners*, 396 U.S. at 339. Analogous to the facts in *Carter*, the proof here only shows that the post of foreman has not been held by a black according to the recollection of three foremen. Unlike *Carter*, the facts here also show a plausible, credible, non-racially motivated reason for the selection in issue. This reason is different from the general, self-serving explanations rejected by this Court in *Turner*. The reason here is pragmatic and supported by facts admitted by both sides. The rejection of this reason establishes a standard which can only be met by random selection or historical proportional representation. This is contrary to the decisions of this Court. *See especially, Carter*, 396 U.S. at 339.

## III

### Error, if Any, Was Harmless Beyond a Reasonable Doubt

Assuming, without conceding, error in the selection of the acting foreman and that the issue is cognizable on federal habeas corpus, the error was harmless beyond a reasonable doubt. *Harrington v. California*, 395 U.S. 250 (1969); *Chapman v. California*, 386 U.S. 18 (1967).

The perceived error involves the selection of the acting foreman. The foreman did not vote for indictment, and his only involvement was to call one witness, swear in the witness, ask the grand jury if they were ready to vote, and sign the indictment. If error, this is a now moot procedural error which had no effect on the integrity of the trial. Ironically, a *Bruton*[14]

[14] *Bruton v. United States*, 391 U.S. 123 (1968).



type error in this case has been declared harmless by all reviewing courts. *Bruton* errors certainly have the potential of affecting the reliability of the fact finding process. The foreman selection error, if any, has no such potential.

## CONCLUSION

"Our goals are truth and justice, and procedures are but means to these ends. Truth and justice are ultimate values, so understood by our people, and the law and the legal profession will not be worthy of public respect and loyalty if we allow our attention to be diverted from these goals." Oaks, "Ethics, Morality, and Professional Responsibility," 3 *B.Y.U.L. Rev.* 591, 596 (1975). For these values, and for the other reasons explained in this petition we respectfully pray that a writ of certiorari issue.

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# APPENDIX

**APPENDIX A**

No. 77-1272

United States Court of Appeals
for the Sixth Circuit

James E. Mitchell and James Nichols, Jr.,
Petitioners-Appellants,
v.
Jim Rose, Warden,
Respondent-Appellee.

Appeal from the United States District Court for the Western District of Tennessee.

Decided and Filed January 9, 1978

Before: Phillips, Chief Judge, Peck, Circuit Judge, and Gray, Senior District Judge.*

Peck, Circuit Judge. On November 6, 1972, Petitioners James Mitchell and James Nichols, Jr., were indicted for two counts of first degree murder by the Tipton County, Tennessee grand jury. On March 22, 1973, they were found guilty after a jury trial.

Prior to the trial, petitioners filed a pro se motion, asking the trial court to dismiss the indictment because the grand jury and the foreman of the grand jury which indicted them had been selected in a racially discriminatory manner. A pretrial hearing was held and the trial judge, making no written or oral findings

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* Honorable Frank Gray, Jr., United States District Court for the Middle District of Tennessee, sitting by designation.

of fact or rulings of law, entered an order which stated in full: "Plea in abatement is overruled."

The ruling was upheld in the Tennessee Court of Criminal Appeals on the grounds that racial discrimination had not been proved, and certiorari to the Tennessee Supreme Court was denied. Petitioners then turned to the federal courts for relief, filing pro se petitions for writs of habeas corpus in the United States District Court for the Western District of Tennessee.

The district judge denied an evidentiary hearing, and ruled that

> the question of racial discrimination in the selection of the grand jury was adequately investigated and that the state trial judge, in ruling that no discrimination had been shown in the selection of the grand jury made the correct decision on the record before him.

The district judge went on to hold, however, that a prima facie case had been made with respect to the foreman issue, and ordered the state to make further response.

The state submitted two affidavits. The foreman of the grand jury which indicted the petitioners stated that he had not voted on the indictments, and that petitioners were indicted after the grand jury had heard only one witness. The judge who had appointed the foreman also submitted an affidavit, stating, "We called Mr. Smith [the foreman] because he has been willing to act in the past and has experience and does a good job as such foreman." The trial judge's affidavit continued:

> In my five counties, I do not have a black grand jury foreman, although I have a black member of my Jury Commission in one county. Most all of my Grand Juries and Petit Juries have sizeable numbers of blacks on them, both men and women. I don't appoint Grand Jury Foremen very often because when their two year term expires, I usually reappoint them, thus they serve a long time and the problem doesn't come up very often. I don't think that I have really given any thought to appointing a black foreman but I have no feeling against doing so.



On the basis of these affidavits, the district court ordered the dismissal of the petitions for habeas corpus relief, stating:

> [N]o racial discrimination in the composition of the grand jury has been shown. On the contrary, it appears that one black person actually served on the grand jury that indicted these petitioners, that the foreman was selected for other than racial reasons, and that the foreman did not vote at the time the indictment was rendered.

The petitioners have appealed that order, contending that they have made out a prima facie case of discrimination in the selection both of the grand jury and of the foreman, which the State of Tennessee has not adequately rebutted. In the alternative, they argue that they have a right to an evidentiary hearing in the district court to further develop the facts.

## I

Tennessee uses the "key man" system of jury selection, relying on three jury commissioners appointed by the trial judge to select a pool of prospective grand jurors from the general population. Tenn. Code Ann. § 22-223. Every two years, the commissioners meet to select names "from the tax records and permanent registration records of the county, or other available and reliable sources," § 22-228. The number of names are determined by the judge. The names are recorded officially in a jury list book, § 22-228(a), then written on cards, sealed in a box,

and drawn at random as needed for jury service. The same list serves as jury pool for both grand and petit juries.

The commissioners have a duty to propose a "list of names of upright and intelligent persons known for their integrity, fair character and sound judgment." § 22-228. The basic statutory qualifications for jury service are that a juror must be at least eighteen years old, a United States citizen and a resident of the county in which he or she serves as juror. § 22-201. In addition, persons convicted of "infamous offenses," of unsound mind, with deficient sight or hearing, or habitually drunk are disqualified. Persons in certain exempt occupations or who would suffer hardship if they served are excused.

The foreman or forewoman of the grand jury is selected in an entirely different manner. In essence, they are hand-picked by the trial judge from the eligible population for a two-year appointment. § 40-1506. They are subject to the same statutory qualifications as jurors except that they must be at least twenty-five years old.

## II

The facts elicited at the pretrial hearing were meager, especially as to hard figures or even substantiated estimates of the racial makeup of Tipton County grand juries. For instance, there is no indication in the record of the total number of persons in the jury pool, nor is there any indication of the racial makeup of the pool. However, some relevant information may be gleaned from the record.

In 1972, the jury commissioners in Tipton County were three men, all white. The November, 1972 grand jury was selected from the jury pool chosen two years earlier. Names were selected



from the local telephone directory,[1] and all three commissioners testified that they selected names only of persons they knew, either personally or by reputation, and that they were aware of their duty to select, without prejudice, black members of the community.

Very few statistics were mentioned at the hearing, although one commissioner testified that he thought the county was about 30% black. (The 1970 Census shows that Tipton County was 32.4% black.)[2] Neither the total number of names in the jury pool, nor the number of blacks was established, though it is significant that the state could easily have done so. This would prove beyond a doubt that there was no discrimination, if such were true, since a jury list book is a statutory requirement, and since the commissioners are acquainted with everyone on

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[1] Petitioners have challenged the use of the telephone directory as a source of names for jury service. The use of phone books has been upheld in the past, *Gebhard v. United States*, 422 F.2d 281 (9th Cir. 1970), but petitioners, relying on census data, have made a showing that 44.3 percent of Tipton County black households are without telephone service while only 20.7 percent of white households are without such service. The use of voting lists with such disparities has been upheld, but on the grounds that registering to vote is a voluntary act which is reasonable to require of jurors. We need not decide whether obtaining telephone service is a similar voluntary act, but note that the Supreme Court, reversing a district court's finding of no discrimination, has held that

> the court should not have passed without response the commissioners' elimination from consideration for jury service of about 9% of the population of the entire county. In the face of the commissioners' unfamiliarity with Negroes in the community and the informality of the arrangement by which they sought to remedy the deficiency in their knowledge upon recompiling the jury list, we cannot assume that inquiry would not have led to the discovery of many qualified Negroes.

*Turner v. Fouche*, 396 U.S. 346, 360 (1970).

[2] The courts may take judicial notice of census figures, absent a showing that they are unreliable for some reason. *Goins v. Allgood*, 391 F.2d 692 (5th Cir. 1968); *cf., Castaneda v. Partida*, 430 U.S. 482, 487-488 (1977).

the list. However, three prior foremen did testify in vague terms about the representation of blacks on the juries themselves.

The three of them had served off and on as grand jury foremen since the early 1950's. None of them could recall a black foreman or forewoman. However, each testified that blacks had served on their grand juries, remembering "several," "some," "probably three or four," "usually two or three," and one black woman on the November, 1972 grand jury that indicted the petitioners.[3]

III

The fundamental rules to be applied in cases charging grand jury discrimination are well established. For almost a century it has been settled law that if a state chooses to use grand juries to return indictments, the jurors must be selected without discrimination because of race or color. In 1879, in its landmark trilogy of cases establishing the right of blacks to serve on juries and grand juries, and the right of every accused citizen to an indictment by a grand jury selected without discrimination, the Supreme Court pointed out:

> It is not easy to comprehend how it can be said that while every white man is entitled to a trial by a jury . . . selected without discrimination against his color, and a negro is not, the latter is equally protected by the law with the former. Is not protection of life and liberty against race or color prejudice a right, a legal right, under the constitutional amendment? And how can it be maintained that compelling a colored man to submit to a trial for his life by a jury drawn from a panel from which

[3] The state presented no rebuttal except the testimony of the Circuit Court Clerk, who agreed with the prosecutor's comment that there had been "a very substantial number of members of the Negro race" on petit and grand juries.



> the State has expressly excluded every man of his race, because of color alone, however well qualified in other respects, is not a denial to him of equal legal protection?

*Strauder v. West Virginia*, 100 U.S. 303, 309 (1879). Substantial underrepresentation, as a result of purposeful discrimination, is as much a constitutional violation as total exclusion. *Castaneda v. Partida*, 430 U.S. 482 (1977); *Turner v. Fouche*, 396 U.S. 346 (1970).

There seems to be a common misconception, exemplified by the trial judge's comments at the evidentiary hearing, the district court's opinion dismissing the petition, and respondent's brief, that constitutional requirements are met if there are simply "some" blacks on grand juries. This is probably due to frequent judicial statements that there is no requirement for any particular jury panel to contain blacks, and that the venire need not contain the names of blacks in the same proportion as they are to be found in the general population. Both these statements are quite true; however, they are true because both may occur without discrimination against blacks. However large a percentage of the jury pool are black, any single jury, randomly drawn, may be all white (or, for that matter, all black). Also, neutral legitimate requirements imposed by the state on its jurors may weigh more heavily on one race than another, resulting in percentages different from those in the general population. Whether the presence of a few blacks on grand juries over the years is evidence tending to prove or disprove racial discrimination depends on the proportions of blacks who are qualified for jury service.

The method of establishing a prima facie case of intentional discrimination is also well-established when, as here, the alleged discrimination is aimed at blacks. If over a significant period of time there exists a substantial disparity between the proportion of blacks in the general population, and the pro-

portion called to serve as grand jurors,[4] and the selection procedure affords an opportunity to discriminate or is not racially neutral,[5] then the defendant has made out a prima facie case, and the burden shifts to the state to rebut the case. *Castaneda, supra,* 430 U.S. 482; *Alexander v. Louisiana,* 405 U.S. 625 (1972).

Once the burden has shifted to the state, it may rebut the prima facie case in several ways. The state may impose any reasonable qualifications it wishes on its grand jurors; for instance, it may require that they be literate, that they not be convicted felons, or that they be registered voters. The neutral imposition of any of these requirements may *possibly* result in the exclusion of more members of one race than another. "There are many possible circumstances which, if they exist

[4] In most reported cases thus far, this statistical analysis has been largely intuitive, based on rough impressions about probabilities. However, given accurate data, the probability that racial results are due to chance can be analyzed mathematically and either affirmed or rebutted with considerable accuracy. For instance, in *Castaneda, supra,* 430 U.S. 482, with a 79.1% Mexican-American population and 39% Mexican-American grand jurors over a period of eleven years, the Supreme Court could determine that the chances of such a result occurring without racial discrimination were less than one in ten to the 140th power and thus could be described as impossible. *See* Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases,* 80 Harv. L. Rev. 338 (1966). Statisticians generally reject the possibility that a particular result is due to chance when the probability of that result occurring by chance is less than one in twenty. *Id.* at 359. We need not decide today at what point the courts should similarly reject an assertion that a particular racial result is due to chance rather than discrimination.

[5] While the facial constitutionality of the key-man system has been upheld, it has been frequently recognized as a method particularly subject to abuse, and therefore subject to close scrutiny by the courts. We note, as has the Supreme Court on numerous occasions, that random selection methods similar to the federal system would avoid most of the potential for abuse found in the key man system, and would probably eliminate challenges such as the State of Tennessee faces here. *Castaneda, supra,* 430 U.S. at 497 n. 18.



here, might account lawfully for the observed disparity. The suggestion of their possible existence is not enough, however." *Stephens v. Cox,* 449 F.2d 657 (4th Cir. 1971). The state must present some concrete evidence of the effect of its neutral requirements, not merely present to the court unfounded suppositions about the literacy, intelligence and good character of its black citizens.[6] Finally, it should be noted that self-serving protestations from the officials involved that racial considerations played no part in the selection are not enough to rebut a prima facie case. *Castaneda, supra,* 430 U.S. at 498 n. 19; *Alexander v. Louisiana, supra,* 405 U.S. at 632.

## IV

Applying these principles to the grand jury selection in this case is difficult because of the vague nature of the data available. Accepting as true the testimony of the grand jury foremen at the pretrial hearing, over the last quarter-century there has been at least one grand jury which was less than 8 percent (one in thirteen) and one which was nearly 31 percent black (four in thirteen). These figures do not help us, however, because there is no way to tell from the record what average percentage of all the grand juries over those years was black, the only statistic which would help to prove or disprove the existence of discrimination.

We need neither depend on questionable estimates nor remand for a time-consuming hearing,[7] however, because there

[6] *See Turner v. Fouche,* 396 U.S. 346 (1970), in which the Supreme Court rejected the state's attempt to explain the disparity in black representation on juries by arguing, without substantiation, that many blacks were not "upright" or "intelligent" enough to serve.

[7] In *Townsend v. Sain,* 372 U.S. 293 (1963), the Supreme Court held that an evidentiary hearing must be held on an application for federal habeas corpus relief "unless the state-court trier of facts has after a full hearing reliably found the relevant facts." *Id.,* at 313.

is no guesswork about the figures in the second aspect of petitioners' case. There has never been a black foreman or forewoman of a grand jury in Tipton County according to the recollections of the trial judge, three jury commissioners, and three former foremen. The statutory qualifications are identical to those of jurors except that foremen or forewomen must be a few years older. The position is filled by the trial judge from the general population, thus affording ample opportunity for discrimination, whether conscious or unconscious. While discrimination must be "intended," officials who select grand jurors must be considered to have intended the natural results which flow from their conduct. *Rabinowitz v. United States*, 366 F.2d 34 (5th Cir. 1966). Thus a judge who "never really gave any thought" to appointing a black is discriminating just as surely as were the jury commissioners who never selected blacks because their names were "never discussed," *Norris v. Alabama*, 294 U.S. 587 (1935), or because they didn't know any blacks, *Turner v. Fouche*, 396 U.S. 346 (1970). Officials who select grand jurors have a duty to learn who is qualified to fill the position of grand juror, and to consider qualified individuals from all segments of society. Failure to perform that duty, resulting in the exclusion of a qualified segment of society, is unconstitutional discrimination. *Turner, supra*, 396 U.S. 346.

Thus the petitioners clearly established a prima facie case of racial discrimination in the appointment of grand jury foremen and forewomen. The state presented no rebuttal to this case at the hearing, but in response to the district court's request for a further answer to this prima facie case, submitted the two affidavits described above. In dismissing the petitions, the district judge stated that the foreman was "selected for other than racial reasons, and . . . did not vote at the time the indictment was rendered." Thus we must decide whether, as the district court ruled, the state has successfully rebutted the prima facie case.



Perhaps understandably, it appears that the district court has given undue weight to the exculpatory affidavit of the trial judge. In *Alexander v. Louisiana, supra*, 405 U.S. 625, the Supreme Court pointed out that

> the clerk of the court, who was also a member of the jury commission, testified that no consideration was given to race during the selection procedure. App. 34. The Court has squarely held, however, that affirmations of good faith in making individual selections are insufficient to dispel a prima facie case of systematic exclusion. *Turner v. Fouche, supra*, at 361; *Jones v. Georgia*, 389 U.S. 404, 407 (1967). "The result bespeaks discrimination, whether or not it was a conscious decision on the part of any individual jury commissioner." *Hernandez v. Texas*, 347 U.S., at 482. . . . The commissioners, in any event, had a duty "not to pursue a course of conduct in the administration of their office which would operate to discriminate in the selection of jurors on racial grounds." *Hill v. Texas*, 316 U.S. 400, 404 (1942).

An absence of blacks qualified to serve as foremen or forewomen has not been demonstrated or even suggested; thus there has been no rebuttal of petitioners' prima facie case.

The fact that the foreman did not vote on petitioners' indictments also fails to support the district court's dismissal. Consideration of this factor is closely linked to the final, implicit question in this appeal: whether proof of discrimination in the selection of a grand jury foreman mandates the same remedy as does proof of discrimination in the selection of the grand jury. Normally, if the state fails to successfully rebut a prima facie case of discrimination, a writ of habeas corpus must issue, since the indictment and all proceedings on that indictment are void. *See Castaneda*, 430 U.S. 482. There is no need for the petitioner to show prejudice, and a showing of no prejudice by the state is no defense. *Hill v. Texas*, 316 U.S. 400 (1942).

The question is whether the same result is required when there is discrimination shown only in the selection of the grand jury foreman. While the parties did not brief this issue, it is necessary that we consider it since the district court apparently relied on a finding of no prejudice, pointing out that the foreman rendered no vote on the indictment.

In 1973, this Court held on facts similar to those here that no discrimination had been proved because the particular foreman in question had not been appointed in the usual fashion, but selected in an emergency from among the grand jurors. There was no challenge to the makeup of the grand jury panel. Thus the defendant could not rely on proof of past absence of blacks from the foreman position, along with a selection process susceptible to abuse, because the foreman in this case had not been selected in the same manner. *Hale v. Henderson*, 485 F.2d 266 (6th Cir. 1973), *cert. denied*, 415 U.S. 930 (1974). Not inconsistent with that opinion, we hold today that where a prima facie case of discrimination in the selection of grand jury foremen has been established, and has not been rebutted, "the conviction cannot stand, because the Constitution prohibits the procedure by which it was obtained." *Hill v. Texas, supra*, 316 U.S. at 406.

The foreman or forewoman is vitally important to the functioning of grand juries in Tennessee, being "the thirteenth member of each grand jury organized during his term of office, having equal power and authority in all matters coming before the grand jury with the other members thereof." Tenn. Code Ann. § 40-1506. He or she is expected to assist the district attorney in investigating crime, may administer oaths to all witnesses, conduct the questioning of witnesses, must indorse and sign all indictments,[8] and like every other chairperson is in a position to

[8] *See* Tenn. Code Ann.,

§40-1510. Duties of foremen or forewomen.—It shall be the duty of such foremen or forewomen of grand juries to assist and cooperate with the district attorney in ferreting out crime, to the end that the laws may be faithfully enforced; and such foremen or forewomen are directed out of term to advise the district attorney with respect to law violations and furnish him names of witnesses, whom the district attorney may, if he deem proper, order summoned to go before the grand jury at the next term. In term time, the foreman or forewoman may order the issuance of subpoena for witnesses to go before the grand jury, unless otherwise ordered by the district attorney.

§40-1622. Power of foreman to administer oath.—The foreman of the grand jury shall have power to administer oaths to all witnesses brought before the grand jury to testify as to the violations of the criminal laws in all cases where the clerks of the criminal and circuit courts may administer said oath.

§40-1706. Concurrence in true bill.—An indictment cannot be found without the concurrence of at least twelve (12) grand jurors, and, when so found, shall be indorsed "A true bill", and the indorsement signed by the foreman.

§40-1709. Presentation of indictment.—An indictment, when found by the grand jury, and indorsed as prescribed by this chapter, shall be presented by the foreman, in their presence, to the court, and filed by the clerk.



guide, whether properly or improperly, the decision making process of the body. Additionally, the indorsement and signature of the foreman or forewoman is indispensible to an indictment in Tennessee, and their absence voids the bill. *Bird v. State*, 103 Tenn. 343, 52 S.W. 1076 (1876).

In any case, even without these important duties and powers, the foreman or forewoman is a full member of the grand jury, and we agree with the district court in *Hale v. Henderson*, 336 F. Supp. 512 (W.D. Tenn. 1972), that a grand jury which is only twelve-thirteenths constitutional cannot render constitutionally valid indictments.

It seems clear that the potential for prejudice, given the position of authority and influence the foreman or forewoman holds, is considerable, and in such cases where the fact of prejudice may be impossible to prove, yet its effect could be so insidious and far-reaching, the courts have refused to require proof of prejudice before granting relief.

However, it is not simply the possibility of prejudice to a criminal defendant that mandates the reversal of convictions based on unconstitutional indictments. In fact, it is quite clear that a constitutional indictment may be returned by an all-white or an all-black grand jury, and the possibility of prejudice is no less if such a jury makeup occurred by chance rather than by design. Even a white defendant has standing to challenge a grand jury selection process which systematically excludes blacks. *Peters v. Kiff*, 407 U.S. 493 (1972). Many years ago it was recognized that the injury is more subtle, and runs deeper than direct racial prejudice against the defendant:

> [R]eversible error does not depend on a showing of prejudice in an individual case. The evil lies in the admitted exclusion of an eligible class or group in the community in disregard of the prescribed standards of jury selection. . . . The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts.

*Ballard v. United States*, 329 U.S. 187, 195 (1946).

In *Peters v. Kiff, supra*, 407 U.S. 493, the state opposed the issuance of the writ to a white prisoner, arguing that

> even if the grand and petit juries were unconstitutionally selected, petitioner is not entitled to relief on that account because he has not shown how he was harmed by the error. It is argued that a Negro defendant's right to challenge the exclusion of Negroes from jury service rests on a presumption that a jury so constituted will be prejudiced against him; that no such presumption is available to a white defendant; and consequently that a white defendant must introduce affirmative evidence of actual harm in order to establish a basis for relief.



*Id.* at 498. The Supreme Court expressly rejected this argument, holding that such discrimination by its very existence denies a defendant due process of law:

> [A] State cannot, consistent with due process, subject a defendant to indictment or trial by a jury that has been selected in an arbitrary and discriminatory manner, in violation of the Constitution and laws of the United States. Illegal and unconstitutional jury selection procedures cast doubt on the integrity of the whole judicial process.

The necessary remedy in such a case is also clear:

> [N]o State is at liberty to impose upon one charged with crime a discrimination in its trial procedure which the Constitution, and an Act of Congress passed pursuant to the Constitution, alike forbid. . . . [I]t is our duty as well as the State's to see to it that throughout the procedure for bringing him to justice he shall enjoy the protection which the Constitution guarantees. Where, as in this case, timely objection has laid bare a discrimination in the selection of grand jurors, the conviction cannot stand, because the Constitution prohibits the procedure by which it was obtained.

*Hill v. Texas*, 316 U.S. 400, 406 (1942).

It is therefore ordered that the cause be remanded to the district court for entry of an order providing that petitioners' convictions be set aside, and that within sixty days the petitioners be reindicted, failing which the writ of habeas corpus shall be made absolute and petitioners released from custody.

## APPENDIX B

In the United States District Court for the
Western District of Tennessee
Western Division

James E. Mitchell,
Petitioner

v. Civil C-75-222

Jim Rose, Warden,
Respondent

and

James Nichols, Jr.,
Petitioner

v. Civil C-75-265

Jim Rose, Warden,
Respondent

### ORDER DENYING MOTION FOR HEARING, ETC.

(Filed March 23, 1977)

Following our memorandum and order of February 17, 1977, in which we directed that a final judgment be entered for the respondent, an earnest motion for hearing and/or amendment of judgment and/or reconsideration has been filed in behalf of petitioners by the University of Tennessee Legal Clinic. In this motion, supported by memorandum, it is contended that petitioners have made a prima facie case with respect to discrimination in the selection of the trial jury and, further, that petitioners have made a case of discrimination in the selection of the grand jury foreman.

With respect to the first contention, that is, the contention having to do with discrimination in the selection of the trial jury, it appears to the court that the instant motion raises this



issue for the first time, and, as we read the assignments of error in the direct appeal of these convictions, there was no contention that such discrimination occurred with respect to the selection of the trial jury. Since the assignments of error on the direct appeal are the only basis for a showing of exhaustion of state remedies here, it is the opinion of the court that petitioners have not exhausted state remedies insofar as they contend that there was racial discrimination in the selection of the trial jury.

With respect to the other contention in the instant motion having to do with selection of the foreman of the grand jury, this court entered an order on February 17, 1976 dismissing the contention on the ground that this issue had been adequately investigated by the state trial judge and that his determination that there had been no racial discrimination was correct. Since this court made the determination that this contention should be dismissed, our determination is further supported by the decision of the Supreme Court of the United States in **Stone v. Powell,** — U.S. —, 49 L.Ed. 2d 1067 (1976). As we read that decision, where the claim of constitutional error does not go to the integrity of the fact-finding process so far as the conviction is concerned, if petitioner received a full and fair hearing in state court as to his claim, the federal court will not review the determination by the state court. Thus, not only have we found the decision in state court to be correct, but also it appears that, since the contention was fairly heard in state court, petitioners are not entitled to another review here. See also: *O'Berry v. Wainright*, — F.2d —, 45 L.W. 2422 (decided Feb. 11, 1977).

Accordingly, the instant motion will be denied.

It is so Ordered.

Enter this 23rd day of March, 1977.

/s/ (Illegible)
Chief Judge

## APPENDIX C

In the United States District Court for the
Western District of Tennessee
Western Division

James E. Mitchell,
Petitioner,
v.
Civil C-75-222
Jim Rose, Warden,
Respondent,
and
James Nichols, Jr.,
Petitioner,
v.
Civil C-75-265
Jim Rose, Warden,
Respondent.

## MEMORANDUM AND ORDER

(Filed February 17, 1977)

This cause is before the court following a further reference to the magistrate and receipt of a second report on reference from the magistrate. The reference was for the single purpose of determining whether or not the violation of the *Bruton* rule with respect to petitioner Nichols was harmless beyond a reasonable doubt. The magistrate, after reviewing the evidence, concluded that the violation of the *Bruton* rule was harmless beyond such doubt.



This court, after consideration, is likewise of the opinion that the violation of the *Bruton* rule, considering the content of the violation of the rule and considering the massive other evidence against this petitioner, was harmless beyond a reasonable doubt.

With respect to both petitioners, Mitchell and Nichols, the court is further of the opinion from the record that no racial discrimination in the composition of the grand jury has been shown. On the contrary, it appears that one black person actually served on the grand jury that indicted these petitioners, that the foreman was selected for other than racial reasons, and that the foreman did not vote at the time the indictment was rendered.

The Clerk will therefore enter a final judgment dismissing these actions. It is so Ordered.

Enter this 17 day of February, 1977.

(Illegible)
Chief Judge

## APPENDIX D

In the United States District Court
For the Western District of Tennessee
Western Division

James E. Mitchell,

Petitioner,

v. Civil C-75-222

Jim Rose, Warden,

Respondent,

and

James Nichols, Jr.,

Petitioner,

v. Civil C-75-265

Jim Rose, Warden,

Respondent.

### ORDER FOR FURTHER RESPONSE

This cause is again before this court following a reference to the magistrate who filed a report on January 28, 1976.

This court agrees with the magistrate that all claims of petitioners other than their claims having to do with racial discrimination in the selection of the grand jury, including the foreman of the grand jury, and the claim of petitioner Nichols based on *Bruton v. United States*, 391 U.S. 123 (1968), should be dismissed. It is so Ordered.

The court disagrees with the magistrate to the extent that he recommends that a hearing be held with respect to racial



discrimination in the constitution of the grand jury which indicted these petitioners. We are of the opinion, having studied the record made prior to the trial, that the question of racial discrimination in the selection of the grand jury was adequately investigated and that the state trial judge, in ruling that no discrimination had been shown in the selection of the grand jury, was the correct decision on the record before him.

We do, however, agree with the magistrate that, based upon the same inquiry, it would appear that a *prima facie* case has been made with respect to discrimination in the selection of the foreman of the grand jury. See *Hale v. Henderson*, 336 F.Supp. 512, 349 F. Supp. 567, and 485 F.2d 266. The record does not indicate any evidence introduced to rebut such *prima facie* case.

We further agree with the magistrate that there appears to have been a violation of the *Bruton*, supra, rule with respect to the petitioner Nichols in connection with the examination of the officer who testified concerning the statement made by petitioner Mitchell.

Accordingly, it is Ordered that respondent further answer these petitions directed to the question concerning discrimination in selection of foremen of the grand jury and in connection with the claimed violation of the *Bruton* rule and, good cause appearing, twenty-three (23) days are allowed in which to answer.

Enter this 17th day of February, 1976.

/s/ (Illegible)
Chief Judge

## APPENDIX E

In the Supreme Court of Tennessee
at Jackson

James Nichols, Jr. and James Mitchell,
Petitioners

v.

State of Tennessee,
Respondent

Tipton Criminal
No. 1

In Re: Petition for Writ of Certiorari of James Nichols, Jr. and James Mitchell

Upon consideration of the petition, briefs, and the entire record in the cause, it is the judgment of this Court that the Court of Criminal Appeals has correctly dealt with the issues.

The writ is denied.

Per Curiam

OFFICE OF CLERK OF THE SUPREME COURT
For the Middle Division of the State of Tennessee

I, Ramsey Leathers, Clerk of said Court, do hereby certify that the foregoing is a true, perfect, and complete copy of the Order Denying Petition for the Writ of Certiorari of said Court, pronounced March 10, 1975, in case of James Nichols, Jr. and James Mitchell against State of Tennessee as appears of record now on file in the office of the Clerk at Jackson.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the Court at office in the Supreme Court Building at Nashville, on this, the 20th day of June, 1975.

Ramsey Leathers
Clerk
By .....
Deputy Clerk



## APPENDIX F

In the Court of Criminal Appeals of Tennessee
Jackson, March, 1974

James Nichols, Jr. and James Mitchell
Plaintiffs-in-Error

v.

State of Tennessee,
Defendant-in-Error

No. 1
Tipton County
Hon. Herman L. Reviere, Judge
(First Degree Murder)

**For the Plaintiffs-in-Error:**

Wilbur F. Cash and
John E. Proctor
Covington, Tennessee

**For the Defendant-in-Error:**

David M. Pack
Attorney General

Weldon B. White, Jr.
Assistant Attorney General

Will Terry Abernathy
District Attorney General

Preston Parks
Assistant District Attorney General

Opinion Filed: June 5, 1974
Affirmed

WILLIAM S. RUSSELL
Judge

### OPINION

James Nichols, Jr., and James Mitchell, the plaintiffs-in-error were jointly indicted in two separate indictments for the murder

in the first degree of William Nabors and Claudie Greer. Plaintiffs-in-error were tried, found guilty of murder in the first degree, and sentenced to consecutive sentences of sixty years in the penitentiary in each case.

The murders arose out of the armed robbery by Nichols and Mitchell of a cafe in Tipton County. The lengthy record reflects that Nichols, with a pistol in each hand, informed the proprietor that it was a stickup and forced him to hand over the cash register receipts of about five or six hundred dollars. Nichols also took money from the person of the proprietor and others, fired several shots into the back room, and fled.

Simultaneously Mitchell, armed with a sawed-off shot gun, was in the back room of the cafe robbing some patrons who were engaged in a dice game. One of those gambling was William Nabors, who was shot in the mouth by Mitchell when Nabors bent over to pick up some change on the floor. Mitchell also went into the front room and took some money from the proprietress and then left. Claudie Greer was killed by a shot from a .38 calibre pistol. Witnesses in the back room testified they saw Greer fall after they heard shot from the front room.

The extensive record contains the testimony of many eyewitnesses. All of them were in a good position to observe the stickup men at close range over a considerable period of time, and all witnesses positively identified plaintiffs-in-error as the men who perpetrated these brutal murders. Nichols was later arrested with a .38 calibre pistol in his possession, and a sawed-off shotgun was found at the apartment of Mitchell's girl friend. In addition, the Memphis police were given a confession to the crime by Mitchell, the substance of which was related to the jury by the police officer who took it.

In view of the foregoing, we overrule the assignments of error attacking the legal sufficiency of the convicting evidence. It is



the often-stated rule that this court cannot reverse on the facts unless the evidence is shown to preponderate against the verdict of the jury and in favor of the innocence of the accused. Plaintiffs-in-error have not made such a showing. *McBee v. State*, 213 Tenn. 15, 372 S.W.2d 173.

The third assignment states that it was error not to sustain the plea in abatement to the indictment because the proof showed that no Negro had ever served as foreman of the grand jury, and that the eligible grand jurors were selected from the telephone directory.

The Tipton County jury commissioners were put on the stand during the hearing on this matter, and they testified that they were aware of the need to select a proper racial balance and sought out the names of blacks they knew personally or by reputation. A sizable number of blacks and people of low income were shown to have in fact served on the jury panels. Past grand jury foremen testified as to the presence of blacks on the grand jury. A black who served on the grand jury who indicted plaintiffs-in-error testified that there was no hostility toward Negroes on the part of the other jurors. "The question of whether there has or has not been shown such a systematic exclusion of racial groups as to violate the rights of an accused is, necessarily, largely one of fact in each case." *State v. Johnson*, 220 Tenn. 49, 413 S.W.2d 694. The facts here do not demonstrate a systematic exclusion of Negroes upon racial grounds, and the assignment of error is overruled.

Plaintiffs-in-error, in their fourth assignment of error, contend that it was error to fail to suppress the pistol and shotgun obtained as a result of their arrest, said arrest being without a warrant and no search warrant having been obtained.

T.C.A. §40-803 permits an officer to make an arrest, without a warrant, when a felony has in fact been committed, and he

has reasonable cause for believing the person arrested committed it. The facts show that the police had reasonable cause to believe plaintiffs-in-error had committed the Tipton County murders, and that they also knew that plaintiffs-in-error were to leave town the following day. Under the circumstances, an arrest was proper. The pistol was found incident to the arrest and was properly admitted into evidence. *Goodner v. State*, 3 Tenn.Crim.App.569, 464 S.W.2d 339. It also appears that the officers were invited into the apartment to search by its owner, and a search with the permission of the owner is not an unreasonable search. *Deerfield v. State*, 220 Tenn.546, 420 S.W. 2d 649.

The *Deerfield* case also applies with respect to the seizure of the sawed-off shotgun, since it was found at another location pursuant to a search after the owners of the premises had voluntarily given the police permission to search.

The fifth assignment of error complains of the action of the trial court in consolidating for trial the two cases of murder. The cases were properly consolidated because both murders arose out of the robbery of White's Cafe by plaintiffs-in-error. When the offenses charged are similar, related, or connected such consolidation is proper. *State ex rel. Gann v. Henderson*, 221 Tenn.209, 425 S.W.2d 616.

The sixth assignment of error argues that it was error not to sever the trials of Mitchell and Nichols because a confession of Mitchell was read to the jury. Plaintiff-in-error Nichols reasons that this confession, made in his absence, denied him the right to confront Mitchell who did not take the stand. Generally, the granting of a severance addresses itself to the sound discretion of the trial court, and we find no abuse of that discretion here. *O'Neil v. State*, 2 Tenn.Crim.App.518, 455 S.W.2d 597. No reference to Nichols was made in the confession, and we do not think the jury was prejudiced against Nichols in hearing it. The



test in granting a severance is a "likelihood of substantial prejudice" if tried together. *Hoskins v. State*, — Tenn.Crim.App.—, 489 S.W.2d 544. The facts in this case do not meet this test, and the motion for severance was properly denied.

Plaintiffs-in-error, who were indigent, requested a mental examination to determine if they were capable of defending the charges against them. In their seventh assignment of error, they say that it was error for the trial court to refuse to order such an examination. Both plaintiff-in-error had been before the trial court prior to the request for the mental examination and had presented, pro se, a motion to suppress certain evidence. The trial court had other opportunities to observe them, and concluded that they were capable of conferring with counsel. We find no basis in the record for a holding of prejudicial error in denying the mental examination.

In the eighth assignment of error, plaintiffs-in-error complain of the trial court's failure to grant them a continuance until April 16, 1973 in order to locate additional witnesses who might have been helpful in their defense. Plaintiffs-in-error were indicted on November 6, 1972, and the actual trial commenced on March 21, 1973. The record shows that the trial court did grant a continuance to obtain additional defense witnesses, even bringing in one witness plaintiffs-in-error stated they needed but who was released prior to trial. Four other defense witnesses for whom a continuance had been granted were not put on by the defense.

We have held that a motion for continuance is within the sound discretion of the trial court, and we find no abuse of discretion in denying a continuance. *Frazier v. State*, 3 Tenn. Crim.App.696, 466 S.W.2d 535. Under the facts in this case, we find that there was a reasonable time in which to prepare a defense, and further delay would have served no purpose.

See *State ex rel. Leighton v. Henderson,* 1 Tenn.Crim.App.598, 448 S.W.2d 82. No prejudice has been demonstrated.

The ninth assignment of error states that the trial court erred in granting a severance as to one Jesse Ford, a co-defendant indicted along with Nichols and Mitchell for the murder of Nabors and Greer. The plaintiffs-in-error contend that by severing Ford's case from theirs, they were deprived of possible help from Ford's testimony who because of his right against self-incrimination, could not be forced to testify against his will on their behalf. That this argument has no merit can readily be seen, since even had Ford been tried with plaintiffs-in-error, he would not have had to take the stand against his will.

The tenth and eleventh assignments of error attack the verdict as returned by the jury. Upon returning from their deliberations, the jury announced that they had found plaintiffs-in-error guilty of murder in the first degree as charged in the indictments, and fixed their punishment "at not less than 30 years and 1 day and not more than 60 years for each count; Nos. 846 and 847." The trial court recognized that this verdict was in improper form, since the indeterminate sentence law does not apply to the capital offenses of murder and rape. *Franks v. State,* 187 Tenn.174, 213 S.W.2d 195.

Plaintiffs-in-error maintain that the trial court should have declared a mistrial when the jury returned the above verdict, and should not have given them further instructions with examples as to what form the verdict should be. We cannot agree. As was said in *State ex rel. Myers v. Brown,* 209 Tenn. 141, 351 S.W.2d 385, "The Court has the power, and it is his duty, when a jury offers to return an informal or insufficient verdict, to send them back to the jury room with directions to amend it and put it in proper form." In light of the above, the



trial court acted properly and the final two assignments of error are overruled.

Affirmed.

/s/ WILLIAM S. RUSSELL
WILLIAM S. RUSSELL, Judge

Concur:

/s/ MARK A. WALKER
MARK A. WALKER, Presiding Judge

/s/ W. WAYNE OLIVER
W. WAYNE OLIVER, Judge

OFFICE OF CLERK OF THE COURT OF
CRIMINAL APPEALS
For the Middle Division of the State of Tennessee

I, Ramsey Leathers, Clerk of said Court, do hereby certify that the foregoing is a true, perfect, and complete copy of the Opinion of said Court, pronounced June 5, 1974, in case of James Nichols, Jr. and James Mitchell vs. State of Tennessee as appears of record now on file in the office of the Clerk at Jackson.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the Court at office in the Supreme Court Building at Nashville, on this, the 20th day of June, 1975.

/s/ RAMSEY LEATHERS, Clerk
By ....., Deputy Clerk

Supreme Court, U. S.
FILED
NOV 17 1978
MICHAEL RODAK, JR., CLERK

# APPENDIX

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

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No. 77-1701

---

JIM ROSE, WARDEN,
Petitioner,

vs.

JAMES E. MITCHELL and JAMES NICHOLS, JR.,
Respondents.

---

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

---

PETITION FOR WRIT OF CERTIORARI FILED MAY 27, 1978
CERTIORARI GRANTED OCTOBER 2, 1978

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1701

JIM ROSE, WARDEN,
Petitioner,

vs.

JAMES E. MITCHELL and
JAMES NICHOLS, JR.,
Respondents.

## APPENDIX

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James Nichols, James Mitchell,
Defendants,

v.

State of Tennessee,
Respondent.

## PLEA IN ABATEMENT

Motion for Dismissal of Indictments for Systematic Exclusion of Minority Groups From the Grand Jury Panel

Defendants, James Nichols, James Mitchell, Moves for Dismissal of the Indictments in This Matter as Being Illegal, Void and Unconstitutional on the Following Grounds.

1

The Array of the Grand Jury of Tipton County, Was Not Selected, Drawn or Summoned in Accordance With the Law and Is X Not Representative of the Community From Which It Was Impanelled Because of Systematic Exclusion of Negroe's, Other Minority's and People of Lower Income, Especially in Regards of the Position of the Forman, of Said Grand Jury.

2

The Grand Jury Was Without Sufficient Evidence Before It, Upon Wich to Hand Down the Present Indictment and Its Deliberations Were Characterized by Conduct and Remarks Reflecting Racial Hostility Against the Three Male Negro Defendants, Contrary to the Fifth and Six Amendments of the United States Constitution.

3

That the Unconstitutional Manner in Which Members of the Aforesaid Grand Jury Is Impanelled, and the Unconstitu-

tional Manner in Which Members of Said Grand Jury Are Carried Over From One Term to the Next, Completely Removes Its Independent Status as an Accusatory Body, and Reduces the Said Grand Jury to Nothing More Than an Extension of the Prosecutors Office to Rubber Stamp Any Indictment Presented to Said Grand Jury, as a True Bill Soley on the Whim and Carprice of a Member of the Tipton County Prosecutor's Office. That the Grand Jury is Selected and the Foreman Appointed Under an Illegal Keyman System.

4

Defendants Further Moves That a Convenient Date Before Trial Be Set for a Hering of This Notice Where Evidence May Be Presented and Arguments Made in Support of This Motion.

5

Defendants Further Moves That the Court Enter an Order Allowing Defendants to Subpoena, Without Cost, Witness to Appear on His Behalf at Such Hearings.

6

Defendants Futher Moves That the Clerk Be Directed to Supply Defense Counsel to Assist Defendants, Without Cost to Said Defendants, With Full and Complete Transcripts of the Proceedings of the Grand Jury.

7

The Foregoing Statements Are Based on Personal Observation and Inquiry of Those Who Have Serve on the Tipton County Grand Jury.

Respectfully submitted

/s/ James N. Nichols
/s/ James E. Mitchell



Sworn and Subscribed to or Before Me on This 1st Day of February, 1973.

/s/ David Field
Notary Public

My Commission Expires on the ... Day of ....., 1973.

(Filed Date: 2-8-73)

In the Circuit Court of Tipton County, Tennessee

| | |
|---|---|
| State of Tennessee<br>vs.<br>James Nichols, Jr.<br>and<br>James Mitchell<br>Defendants. | Nos. 846 and 847 |

BE IT REMEMBERED, that the above-entitled cause came on to be heard on this, the 13th day of March, 1973, at 9:30 a.m., in the above Court, before the Honorable Herman L. Reviere, Judge, presiding, when and where the following proceedings were had of record, to wit:

APPEARANCES:

GENERAL ABERNATHY, ESQ.,
and
GENERAL PARKS, ESQ.,
FOR THE STATE OF TENNESSEE

JOHN E. PROCTOR, ESQ.,
and
WILBUR F. CASH, ESQ.,
FOR THE DEFENDANTS

[3] **PROCEEDINGS**

THE COURT: Make a statement to the Court of just what the purpose is, and soforth.

MR. PROCTOR: If the Court please, there are two. Number 1 is a plea in abatement to the indictment. It's a motion for dismissal of indictments for a systematic exclusion of minority groups from the Jury panel. Then, there is a motion to suppress alleging certain evidence was procured by the State by reason of an illegal search. Then, last, the pre-trial motions to divulge any statements against the interest of the defendants or any matters of medical, scientific or nature or personal items that might be heard. Now, we didn't want to waive, actually waive. If the plea in abatement to the indictment was sustained, it would end the other motions.

THE COURT: Mr. Attorney General.

MR. PROCTOR: If the defense would be willing to take up the motion to suppress out of order, if we can do so without waiving the plea in abatement which should come first.

THE COURT: The Court would not let the defendant waive any of its rights, but—let me say this: The last motion, as well as I understand it, the question of demanding of the State any statements of evidence——

[4] GENERAL ABERNATHY: If Your Honor please, we won't have any trouble at all.

THE COURT: I understand there's no contest here. The State will provide you with any statements made by these defendants.

GENERAL ABERNATHY: Yes, sir. Later, we'd be glad to take it as item by item before Your Honor, but right now, we've got five or six Memphis policemen up here summoned by the defendant, and I'd like for them to be able to return to duty



as soon as possible. I'd like for the motion to suppress to be taken up first for that reason only.

THE COURT: All right, sir.

MR. PROCTOR: We don't object to that as long as we don't waive.

THE COURT: The Court will protect your rights, sir, and not waive any of your rights.

MR. PROCTOR: Thank you, sir.

MR. CASH: This is the matter of STATE OF TENNESSEE VERSUS JAMES M. NICHOLS, JR. and JAMES MITCHELL on two indictments; 847. This first one is a motion to suppress.

(Evidence Heard on Motion to Suppress)

(Witness excused.)

Mr. Cash: Your Honor, we're not going to call any of the other witnesses in connection with this motion to supress. However, we do want to go ahead with our motion—our Plea in Abatement. The motion about the Grand Jury. We'd like to call the three Grand Jury Commissioners at this time. Those are our next witnesses. We'd like to call the jury commissioners to find out how the jury panel was selected.

The Court: All right, Mr. Attorney General, what Mr. Cash has asked for it the calling of the jury commissioners on selection of the jury. I don't know how far this Court's going to go into this question, Mr. Cash. The Court can take judicial notice that this Court has sonsistently had black people on our juries. There are blacks on the jury at this term. There were blacks on the jury at the term of the indictment of these defendants. The Court does not recall of its own knowledge whether there were blacks on the Grand Jury that indicted. But, at least, since this Court has been on the Bench; in 1966, I believe it is,

there have been blacks serving on the jury for this Court and on the Grand Juries of this Court. The records—were they marked as blacks and whites—which the Federal Courts prohibit us from doing—would indicate this. This Court knows of its own knowledge, and I think the attorneys representing the defendants in this case know of their own knowledge— Maybe these defendants don't know this—but the Clerk can be put on; the jury commissioners can be put on, but there is no reason and the Court will allow you to put on some proof—but there's no reason to go into bringing every citizen in here to show this. This Court knows this and the Court makes this statement into the record, so that any reviewing Court will know this—that for many years, at least, certainly, during the time that these defendants were indicted, there have been blacks serving on the juries in large numbers and on the Grand Juries in this Court.

As I said, I'm not positive about the particular make-up of the Grand Jury but it could be very easily found out and put into the record what the Grand Jury make-up in this case was—in this particular case—and I think we should do that.

Mr. Cash: We'd like, also, to find out how these jury commissioners go about selecting the Grand Jury to insure that a proper number of blacks and other minority groups and these peoples' peers are in the panel.

The Court: All right, sir.

Mr. Cash: We'd like to call William Simonton.

Whereupon,

**WILLIAM SIMONTON, JR.,**

was called as a witness, and after having been first duly sworn, **[56]** was examined and testified as follows:

**Direct Examination**

BY MR. CASH:

Q. You're William C. Simonton?



A. Yes, sir.

Q. Jr.?

A. Yes, sir.

Q. Mr. Simonton, you're a citizen of Tipton County, Tennessee?

A. Yes, sir, indeed.

Q. And I ask you whether or not you have served as a jury commissioner of this county?

A. Yes, sir, I have.

Q. Can you tell me approximately how many years you've done so?

A. Approximately 10 years.

Q. In the makeup of the jury commission, or commissioners, do you have a chairman?

A. Yes, sir.

Q. I ask you who has acted as chairman—well, back to November, when you made up the jury panel, who was the acting chairman of the jury commissioners at that time?

A. I was.

**[57]** Q. Had you acted as such chairman before that time?

A. Yes, sir.

Q. Now, what I want to ask you, Mr. Simonton, did you act, also, as jury commissioner for this present term of Court, the March Term?

A. Yes, sir.

Q. Now, for the November Term of Court when the jury panel was selected, may I ask you how you obtained the names that we used to be drawn here by His Honor to act as jurors?

A. Well, the jury panel is kept in a locked metal box. Each name on a separate card. When we get through with one term, I lock the box, initial the seal and seal the box. When we get ready to draw the jurors the next time, I break the seal, un-

lock the box, we tumble the cards and then open the box and we have a child, I believe—I believe the requirement is that the child be less than 10 years old, and we have the child draw the names.

Q. Did you have a child draw these names at the November Term when you got ready?

A. Yes, sir.

Q. Now, I ask you: Where did you get those names that were in the box?

**[58]** A. The present jury list is made up from the telephone book.

Q. And who made that up? Did you and your commissioners?

A. The present commissioners have been serving for about 10 years. We made up that list.

Q. And you used the current telephone book at that time 10 years ago?

A. No. No. This present jury panel was selected about two years ago.

Q. Did you also select this by the use of the telephone book?

A. Two years ago is the first time we have used the telephone book. Prior to that we used the voter registration list.

Q. So, the November Term of Court then you did use a list that was made up from use of the telephone book?

A. Yes, sir.

Q. What listings or what telephone book did you use?

A. We used the telephone book furnished locally by South Central Bell, which includes Covington, Mason and Munford exchanges.

**[59]** Q. How can you insure from the use of the telephone book that you're getting a proportionate number of blacks to the overall population, for instance, of the community?



A. Well, we are aware of the need to show a proper racial balance. We have discretion. It's not just a case of going down the list and every five names, you pick. We use this only as a guide.

Q. Well, then, just how do you go about using this discretion? Tell the Court. We'd like to know exactly how that is determined, as far as you can tell us?

A. Well, we take the telephone book and we go down the list and we see the name of someone that we know, either in person or their reputation, to be of good character and we take that name and put it on the card.

Q. And how do you go about establishing this good reputation?

A. By reputation. Our commissioners are from three distinct areas of the county and, among the three of us, we're pretty well supposed to know, either personally or by reputation, people throughout the county.

Q. And do you make any effort to pick people by, say, income?

A. No.

**[60]** Q. Whether or not they're from the low income, so many from the medium income and so many from the high income groups?

A. The thought never crossed my mind, sir.

Q. What do you do to make sure that blacks are on there,—the number of blacks?

A. We are aware of the necessity of having a proper representation. If you could phrase the question a little bit more specifically, I could answer you a little bit more specifically.

Q. I'm merely asking you this, Mr. Simonton: How do you insure that you will have a proper proportionate or a proper ratio of black members on this jury panel? That's really my question.

A. Well, we seek out the names of black citizens who we know.

Q. Black citizens that you what?

A. Whom we know, either personally or by reputation.

Q. And you don't make any effort to pick any black members that you don't know or white members that you don't know?

A. Black or white, either; no, sir.

Q. So you depend on knowing these people, then; your knowledge of these people?

**[61]** A. Either personally, or by reputation; yes, sir. If it's just a name to us, we have to pass it up because we don't know them.

Q. So if you—I, more or less, ask you a hypothetical question —so if you know, say, 10 percent of the blacks and 90 percent of the whites then that would be the ratio that would be used on this panel; is that true?

A. If the percentages were valid; yes, sir, that would be the way that it would be chosen.

**[62]** Q. So you don't really make any effort to insure that you have a proper ratio then, or a mathematical ratio——

THE COURT: Mr. Cash, the Court knows of no requirement that there be a mathematical ratio. The Court believes the law to be that the jury commission shall select citizens whom they feel are qualified under the basis of the law of this State. They have copies of this law. I believe he's testified that they try to put people in there that they know or know their reputations. I think we ought to be more specific and ask him, rather than ratios, if they have numbers, or substantial numbers of blacks or not; whether they do or don't. There's no requirement that this Court knows of of any ratios, where they be black, or low income or high income, or whatever. It's just a



general picking of the population of this county in which this case is being tried.

MR. CASH: We except to the Court's ruling.

THE COURT: All right, sir. Let's proceed.

MR. CASH: I have no further questions.

MR. CASH: Do you know the population ratio of black and white in the county?

A. We have approximately 30 percent black population **[63]** in the county, the last figure I saw.

MR. CASH: Thank you.

THE COURT: Mr. Attorney General.

**Cross-Examination**

BY GENERAL ABERNATHY:

Q. Mr. Simonton, speaking of that 30 percent black population, would you know of your knowledge that just, maybe, a couple of years ago on the change of venue, a case transferred from Lauderdale County here, involving one Donald Brooks, who was charged with cutting a white woman's throat in Lauderdale County, would you know that on the trial of that case there were four members of the Negro race on that jury?

A. No, sir, I wouldn't be aware of that.

GENERAL ABERNATHY: That's all. Thank you.

THE COURT: Let me ask you a question or two, please, sir. Do you recall from your own knowledge as to whether you have, in putting the names in the box and then subsequently drawing them out, from your knowledge and your discussion with the other jury commissioners as to whether a sizeable number of blacks and those of low economic status have been on the jury panel?

THE WITNESS: Yes. We have been aware that there has been a sizeable number of blacks on each jury **[64]** panel. I must say that economic status does not enter into our consideration.

THE COURT: But let me ask you along these lines: Do you know a lot of people and, consequently, do you know that their status is both high and low economically?

THE WITNESS: Yes, sir.

THE COURT: Anything further from this witness?

Mr. CASH: No, sir.

(Witness excused.)

MR. CASH: Call William Bibb.

Whereupon,

**WILLIAM BIBB,**

was called as a witness, and after having been first duly sworn, was examined and testified as follows:

**Direct Examination**

BY MR. PROCTOR:

Q. Mr. Bibb, you're a member of the jury commission; a member of the three jury commissioners of Tipton County?

A. I am.

Q. How are the jury commissioners of Tipton County appointed?

A. By the Judge.

**[65]** Q. What Judge?

A. The Circuit Judge.

Q. To serve a definite term of office?

A. Four years.



Q. The jury that served back at the—that were indicted during the November 1972 Term, how was the Grand Jury selected for that time, that period?

A. Mr. Proctor, we're given a number of names by the Judge to be drawn—the number of names.

THE COURT: Excuse me, Mr. Proctor, you don't mean the Grand Jury.

MR. PROCTOR: Oh, excuse me. I mean the jury panel.

A. These jury panels. The jurors names are in a lock box and kept in a safe in the Clerk's Office. The Chairman opens the box and the jury commission is called. These names are called by a child who is under 10 years old, one by one, and they are selected in this manner.

Q. By what method—where does the jury commissioners get that list? I think they used to get it from the voters registration list, but have they departed from that practice? How were they obtained during the November 1972 Term of Court?

**[66]** A. They were selected from the telephone directories **[66]** of the county.

Q. There would be no way of determining a person's race—whether he was black or white, yellow, brown—by the telephone directory; would you?

A. Yes, sir. If you knew this person you would know; yes.

Q. You jury commissioners, at least one of you, would have a personal knowledge of the individual, either by personal acquaintance or by reputation and from the telephone directory?

A. Of those that we know, as far as it would be possible, in our particular area of the county.

Q. And if you don't know the man, either by personal acquaintance or by reputation, they are not picked?

A. They're not supposed to be unless we are pretty well aware of their reputation.

Q. Do you know whether or not—were there any colored members on the Grand Jury during November of 1972?

A. No, sir, I do not know. We do not select the Grand Jury.

Q. Would there be any way for the jury commission to know what proportion of blacks and whites would be on the jury panel in November of 1972?

**[67]** A. No, sir. Unless those that we know and as they were drawn out and taken in the order in which they were drawn.

MR. PROCTOR: I believe that's all.

GENERAL ABERNATHY: Thank you, sir.

(Witness excused.)

MR. CASH: Call W. D. Davis.

Whereupon,

**W. F. DAVIS,**

was called as a witness, and after having been first duly sworn, was examined and testified as follows:

**Direct Examination**

BY MR. CASH:

Q. Your name is W. D. Davis?

A. No, sir.

Q. What is it, then?

A. W. F. Davis.

Q. Where do you live, Mr. Davis?

Q. Where do you live, Mr. Davis?

A. Out about Charleston.

Q. What Civil District is that?

A. Fifteen.

Q. How long have you lived there?



A. All my life.

Q. Mr. Davis, I ask you if you are on the jury **[68]** commission of Tipton County, Tennnessee?

A. Yes, sir.

Q. How long have you been on it?

A. About 10 years, I imagine.

Q. You're been serving with Mr. William Bibb and with Mr. William Simonton?

A. That's right.

Q. Now I ask you: Were you serving as such, or just prior to, the November Term of Court of 1972?

A. Yes, sir.

Q. And did you and Mr. Bibb and Mr. Simonton actually choose a jury panel for that particular term or Court?

A. Yes, sir.

Q. Will you tell this Court exactly how you went about doing that?

A. Well, we—there's a girl—I imagine she's about six years old. She draws the names.

Q. Draws these names from where?

A. A box. A locked box. Mr. Simpson would lock it after each drawing and seal it and initial it and when we'd get ready to draw another one, he'd open it.

Q. What was done with this box after—Who safeguards it?

**[69]** A. The Clerk.

Q. The Clerk of the Court?

A. Yes, sir.

Q. Do you know where he keeps it?

A. He keeps it in a lock box.

Q. Is that a safe in his office?

A. Yes, sir.

Q. You say it has names in there; where did you get those names?

A. From the telephone directory of Tipton County,.

Q. How did you go about choosing the names from the telephone directory?

A. Well, we just went down the list and wrote them on the cards.

Q. Well, did you take every fifth one or tenth one, or what?

A. No. We just went down the list and the ones that we knew or knew of their reputation, we'd select them on that merit.

Q. Did you make an effort to see that a sizeable number of blacks was on the list?

A. Yes, sir.

Q. Did you make any effort to determine what **[70]** proportion of blacks you had?

A. Well, yes, sir, we tried to get proportions from the county.

Q. And you actually went about your selection in that procedure with a young six-year old girl making a selection out of the box?

A. That's right.

Q. Did you use this little girl, prior to the November Term of Court? Do you recall?

A. Well, I just can't remember exactly, but Mr. Simonton usually brought the girl along. He'd bring different ones. He'd get them off the street after school. We'd usually wait till after school. We'd have to wait till after school so we could find someone that age. I don't remember their names.

Q. Is any consideration given to their station in life, their economic status?

A. No, sir. We just went down the telephone book.

Q. You mostly go by what you think their reputation is?



A. Yes, sir. They're supposed to be of good character. That's my understanding.

Q. And that's just from your general knowledge?

**[71]** A. Yes, sir. And in talking to other people.

MR. CASH: That's all.

GENERAL ABERNATHY: No question. Thank you.

(Witness excused.)

Whereupon,

**FRANK McBRIDE**

was called as a witness, and after having been first duly sworn, was examined and testified as follows:

**Direct Examination**

BY MR. CASH:

Q. You're Frank McBride, Sr.?

A. Yes, sir.

Q. Live here in Covington?

A. Yes, sir.

Q. You're a life-long resident of Tipton County, Tennessee?

A. Yes, sir.

Q. Mr. McBride, have you ever acted as foreman of the Grand Jury of Tipton County, Tennessee?

A. Yes, sir.

Q. Over how many years would you say you did?

A. Oh, ten or twelve years ago I was on for five or six years, I would say, and then about two or three times **[72]** since then, just for one session of Court.

Q. Have you ever known of any blacks acting as foreman of the Grand Jury?

A. Acting as Foreman?

Q. Yes, sir.

A. No, sir. I was always foreman when I was on the Grand Jury.

Q. Have you ever known of any foreman that was a black man?

A. No, sir.

Q. How were you selected as foreman? Who made that selection?

A. The Presiding Judge.

Q. And he's the one——

A. Well, it was back during Judge Walker's—Judge Walker was the first one that appointed me.

Q. Your function as foreman is to what—guide the proceedings of the Grand Jury?

A. That's right.

Q. Is it your job to get the witnesses in and out of the Courtroom or the Grand Jury Room?

A. (Nodded affirmatively.)

Q. And move proceedings along?

[73] A. That's right.

Q. To your own knowledge were you careful to—or were your Grand Jurors careful to weigh all the evidence pro and con that was presented to the Grand Jury?

A. As far as I know.

Q. And they were to find out if there was probable cause or was not probable cause?

A. (Nodded affirmatively.)

Q. Were there any colored on the Grand Jury on which you acted as foreman?

A. Yes, sir.

Q. That's been true at the last several times that you've acted as foreman?



A. Yes, sir.

Q. How many, as a rule, would you have on your Grand Jury—one, two, five, or what?

A. Oh, I think we've had as many as—usually, if I remember correctly, it's three or four.

Q. On your last Grand Jury that you were foreman of, how many did you have; do you recall?

A. I don't recall the exact number but, probably three or four.

Q. You just say "probably", because you don't [74] recall?

A. No, I really don't.

Q. You know there was, at least, some?

A. Yes, there was some.

MR. CASH: That's all.

GENERAL ABERNATHY: Thank you. No questions.

(Witness excused.)

MR. CASH: Call Peyton Smith.

Whereupon,

**PEYTON J. SMITH**

was called as a witness, and after having been first duly sworn, was examined and testified as follows:

**Direct Examination**

BY MR. CASH:

Q. You're Peyton J. Smith?

A. Yes, sir.

Q. You're a resident of Tipton County, Tennessee?

A. Yes, sir.

Q. For how many years, Mr. Smith?

A. All my life.

Q. Mr. Smith, I ask you, have you performed the duty of foreman of the Grand Jury of Tipton County, Tennessee?

A. Yes, sir.

**[75]** Q. How many times?

A. Quite a few. I was foreman for several years back in the early '50's, and, because of health reasons, I had to resign and then I have served several times since then on occasion of the illness of the foreman at that time and actually having been summoned to serve on the jury and drawn again in the Grand Jury. I've had to serve then.

Q. When was the last time you served?

A. November Term of Court; '72.

Q. Have you known of any foreman that has been black?

A. No, sir.

Q. Did any blacks serve on the Grand Jury back in the November Term of Court, '72?

A. Yes, sir.

Q. How many?

A. One that I remember particularly. There might have been another, but I just happen to remember this one.

Q. Do you recall the name of the individual?

A. No, I don't recall the name.

Q. But you do recall that there was at least one black; there may have been two, you say?

A. It could have been another one; I don't remember **[76]** but I know this one in particular because I asked that person to serve on one of the committees to examine the County Penal Farm.

Q. Was this black a female or male?

A. Female.

Q. But you don't recall the name?

A. No, sir.



Q. How were you chosen at the November Term of Court? Who chose you to be foreman of the Grand Jury?

A. The foreman who had been serving on a permanent basis at that time could not be here and I was asked to come and appear before this Court and the judge asked me to serve.

Q. Who asked you to appear?

A. Mr. Naifeh, who was the foreman the Term before.

Q. You appeared before His Honor here?

A. Yes, sir.

Q. And His Honor commissioned you or appointed you as foreman of the Grand Jury for the November Term?

A. Yes, sir.

Q. Was that in writing or was that just oral?

A. Oral.

Q. You never received any commission or appointment in writing?

**[77]** A. No, sir.

Q. In your other times that you've served—When was the last time you served before the November Term of Court?

A. Well, as well as I remember, it was two years before and I served twice.

Q. Were there any blacks on those Grand Juries?

A. Yes, sir, there were several on there each time.

Q. But only on at the November Term?

A. Yes, sir.

MR. CASH: That's all.

THE COURT: Are there any questions from the State?

GENERAL ABERNATHY: Just one thing, if Your Honor, please.

**Cross-Examination**

BY GENERAL ABERNATHY:

Q. In paragraph II of the Defendants' Plea in Abatement this question is raised: that the Grand Jury's deliberations were characterized by conduct and remarks reflecting racial hostility against these three male Negro defendants, contrary to the Fifth and Sixth Amendments of the United States' Constitution. Now, Mr. Smith, that's the charge with reference to the Grand Jury of which you were the foreman, which returned the indictments against these men. Did anything like that happen in the jury room?

A. Not that I recall. I don't remember anything of that nature. We heard testimony of such witnesses as we called and there were no inflamatory or degrading remarks made at the time.

Q. Nothing done reflecting any racial hostility in that Grand Jury Room?

A. No, sir.

GENERAL ABERNATHY: That's all.

**Redirect Examination**

BY MR. CASH:

Q. Who furnished you with the list of the individuals to call as witnesses before the Grand Jury?

A. They were listed on the bill provided by the Attorney General.

Q. Were there any blacks on that list?

A. I don't recall. In fact, I don't think we called—I don't know whether we called all the witnesses or not. Sometimes we don't. We merely call the number of witnesses till such time as the Grand Jury is satisfied and ready to make a decision and they don't want to call any more.



Q. So you don't recall how many or if you called any blacks?

**[79]** A. No. It was quite a few bills we had that day and I'd have to look at the bills and the indictments and look at the names before I could tell you.

Q. Mr. Smith, are there any transcripts—Do you have a court reporter in the Grand Jury room?

A. No, sir.

Q. There is no transcript made of any of the testimony that's given by any of the witnesses?

A. No, sir.

Q. You simply question the witnesses that you feel, or that someone has furnished you, and then when you feel that there is enough evidence to show probable cause, then you——

A. (Interrupting) I usually questions the witnesses first to get basic information to the attention of the members of the Grand Jury and then I ask, after each witness has been examined, if there's anyone in the room that wants to ask any further questions of that witness. They are, each and every one, given an opportunity to question the witness.

Q. These proceedings are entirely oral and there's no written record of what transpires in there?

A. No written record, other than the names of the witnesses who appeared are entered into the Courts records.

Q. Then, on the indictments, if there are a number **[80]** of names that appear on there, it's not necessarily all those names?

A. Only the ones that appear.

Q. Only the ones that appear are on the indictment?

A. Only the ones that appear——

GENERAL PARKS: (Interrupting) If the Court please, I think we can eliminate all that. Here are the indictments (indicating); he's got a copy of them and they speak for themselves.

Q. (By Mr. Cash) What I'd like to find out: Did you call all

these persons; Preston Shankle, Charles Lavelle, Jack Blackwell, Robert Pickard, Bill Stimpson——

A. May I see the document?

THE COURT: I believe he's stated that they were all listed on there, but he didn't necessarily call them all.

MR. CASH: Well, at one time I get one impression——

THE WITNESS: I called one witness Charles Lavelle. If you'll look on here you can see that.

Q. (By Mr. Cash) He's the only witness you called out of that group of pepole that's listed on there?

A. Yes, sir.

[81] Q. That's all I wanted to find out.

A. The Grand Jury members were polled to see if they wanted to hear any other witnesses and they said they did not.

Q. You don't recall any other witnesses that were called for that particular indictment?

A. No, sir.

MR. CASH: Thank you.

(Witness excused.)

Whereupon,

**JIMMY NAIFEH**

was called as a witness, and after having been first duly sworn, was examined and testified as follows:

**Direct Examination**

BY MR. PROCTOR:

Q. State your name, please.

A. Jimmy Naifeh.

Q. You haye been recently serving as foreman of the Grand Jury of Tipton County?



A. Yes, sir.

Q. How long have you so served?

A. Approximately two years.

Q. Have you ever known of a colored foreman of the Grand Jury of Tipton County?

[82] A. I haven't known if there was or if there wasn't.

Q. And you did not serve during the November 1972 Term of the Circuit Court. I believe Mr. Smith served?

A. That's correct.

Q. And you don't know who was on this particular Grand Jury?

A. No, sir.

Q. Have blacks served on the Grand Jury since you've been foreman?

A. Yes, sir.

Q. Could you give us some idea of what proportion of blacks to whites have served during this period?

A. There are usually two or three blacks.

Q. Have you known of any 18 to 21 year olds that have served?

A. No, sir. I can't say that any have or have not. We don't know their ages.

MR. PROCTOR: That's all.

GENERAL PARKS: No questions.

(Witness excused.)

Whereupon,

**MRS. HAROLD BILLINGS**

was called as a witness, and after having been first duly **[83]** sworn, was examined and testified as follows:

**Direct Examination**

BY MR. PROCTOR:

Q. Mrs. Billings, did you serve on the Grand Jury of Tipton County at the November 1972 Term of the Circuit Court?

A. I did.

Q. Do you recall whether or not there were any blacks on the jury?

A. On the Grand Jury or in the room?

Q. On the Grand Jury.

A. Mrs. Buford served with us. She's sitting back there (indicating).

Q. Were there any others?

A. No, sir, we were drawn out of a hat and that's the way it landed.

Q. Do you recall there being more than one witness that appeared before the Grand Jury in connection with the murder case in which James Nichols, Jr. and James Mitchell were charged during that session?

A. November was a long time ago, but, as far as I know, Lavelle—Sherriff Lavelle was the only witness that we heard on that.

Q. During the course of the conversation concerning these **[84]** parties was there any discussion or anybody—did anybody vioce any discrimination against them because of their race or color?

A. No, sir; definitely not.

MR. PROCTOR: That's all. Thank you.



**Cross Examination**

BY GENERAL PARKS:

Q. Let me ask you this, Mrs. Billings: Were your deliberations on that day in reference to investigating this case we're talking about characterized by conduct and remarks reflecting racial hostilities against the three male Negro defendants?

A. No, sir. Frankly, we were all scared to death and the questions we asked were quite serious and we were all serious-minded about it all. There was no comments of any form.

**Redirect Examination**

BY MR. CASH:

Q. You just made the comment that you were all scared to death. Who were you afraid of and why were you afraid?

A. I didn't mean it that way, but we were serious about it. I think for all of us it was the first time to be on any type of jury duty.

**[85]** Q. You're not implying then that you acted out of fear?

A. No, we were not intimidated. We were serious about it. It was just kind of an expression.

MR. CASH: I just wanted to clarify that, Mr. Billings. That's all.

(Witness excused.)

MR. PROCTOR: Call W. B. Davis.

THE SHERIFF: Mr. W. B. Davis is in Florida. I'm not sure when he'll be back.

MR. PROCTOR: Marvin E. Gay.

Whereupon,

**MARVIN E. GAY,**

was called as a witness, and after having been first duly sworn, was examined and testified as follows:

**Direct Examination**

BY MR. CASH:

Q. Your name is Marvin E. Gay?

A. Yes, sir.

Q. Mr. Gay, did you serve on the Grand Jury back at the November Term of Court, 1972?

A. Yes, sir.

Q. And at the time did you and the others consider **[86]** the indictments against two individuals here, Nichols and Mitchell?

A. Yes, sir.

Q. How many blacks served on that Grand Jury with you?

A. One.

Q. Was that Mary Ann Buford?

A. Yes, sir, I believe that's her name. She's sitting right there (indicating).

Q. How many witnesses were called to appear before your group?

A. One, as I know of; Mr. Charles Lavelle.

Q. You don't recall any others?

A. No, sir.

Q. I ask you: What was the general attitude of the Grand Jurors relative to the fact that these two, indicted here, were black?

A. Would you repeat that?

Q. Did the fact that these two defendants here were black—did that enter into the discussion of have anything to do with the indictment?



A. No, sir. Not at all.

Q. You didn't note any hostility because of race?

A. No, sir.

**[87]** MR. CASH: No further questions.

GENERAL PARKS: No questions.

(Witness excused.)

MR. PROCTOR: Call Richard C. Morrison.

Whereupon,

**RICHARD C. MORRISON,**

was called as a witness, and after having been first duly sworn, was examined and testified as follows:

**Direct Examination**

BY MR. PROCTOR:

Q. Your name is Richard C. Morrison?

A. Yes, sir.

Q. You were a member of the Grand Jury that served for the Circuit Court of Tipton County, Tennessee, at Covington during the November 1972 Term of Court?

A. Yes.

Q. Were there any blacks that served with you on this jury?

A. There was one.

Q. Do you recall her name?

A. Mary Ann Buford.

Q. Were there more than one witness that testified in connection with the indictments where the two blacks, James **[88]** Nichols, Jr. and James Mitchell, at that time for the alleged murders?

A. No, sir.

Q. During that time was there any hostility expressed towards these defendants because they were blacks?

A. No, sir.

MR. PROCTOR: I believe that's all.

GENERAL PARKS: No questions.

(Witness excused.)

MR. CASH: Call Henry L. Peel.

Whereupon,

**HENRY L. PEEL,**

was called as a witness, and after having been first duly sworn, was examined and testified as follows:

THE COURT: Mr. Cash, I think we could save a little time by agreeing that there was only one black that served on this Grand Jury.

MR. CASH: All right.

**Direct Examination**

BY MR. CASH:

Q. You are Henry L. Peel, better kown as Lonzo Peel?

A. Right.

**[89]** Q. Mr. Peel, were you on this Grand Jury back at the November Term 1972?

A. Yes, sir.

Q. Did you note any hostility expressed or indicated in any way relative to these two blacks that were indicted on a murder charge at that time?

A. No, sir, I did not.

Q. You didn't note any at all?

A. No, sir.



Q. And your deliberations were strictly on the evidence presented by the witnesses that appeared in the Courtroom?

A. Yes, sir.

MR. CASH: That's all.

(Witness excused.)

MR. PROCTOR: Call Mary Ann Buford.

Whereupon,

**MARY ANN BUFORD,**

was called as a witness, and after having been first duly sworn, was examined and testified as follows:

**Direct Examination**

BY MR. CASH:

Q. You're Mary Ann Buford?

**[90]** A. That's right.

Q. Is it Mrs. Buford?

A. Miss.

Q. Miss?

A. Yes, sir.

Q. Miss Buford, you did serve on this Grand Jury back in November Term of Court, 1972?

A. Yes, sir, I did.

Q. I believe it's been established you were the only black. Do you recall that you were?

A. Yes, sir.

Q. Now, Miss Buford, I ask you: You are a member of the same race as these two individuals. Was there hostility denoted in any way relative to the indictments of these two individuals?

A. No, sir, no color or race was even discussed in the case at all.

Q. You didn't detect any kind of prejudice?

A. No, sir.

Q. Being a black, you would be sensitive to that type of prejudice, if there were anything?

A. I guess so.

Q. You didn't detect any?

[91] A. No, sir.

Q. None whatsoever?

A. None whatsoever.

Q. You're sure about that?

A. I'm positive.

MR. CASH: That's all.

(Witness excused.)

MR. PROCTOR: I wonder if we could examine these other six collectively?

THE COURT: Let the others come around.

MR. PROCTOR: Mrs. O. V. Zenar, Nancy E. Ward, Billy Wooten, Mrs. W. B. Reeves and J. C. Thornton, Jr.
Whereupon,

**MRS. O. V. ZENAR, NANCY E. WARD, BILLY WOOTEN, MRS. W. B. REEVES, J. C. THORNTON, JR.**
were called as witnesses, and after having been first duly sworn, were examined collectively and testified as follows:

**Direct Examination**

BY MR. CASH:

Q. I'm going to ask you collectively, all of you did serve on the Grand Jury at the November Term of Court 1972?

A. (Each witness nodded affirmatively.)



Q. And you served on there and you were a part of the [92] Grand Jury Panel that indicted James Mitchell and James Nichols, Jr. on first degree murder.

A. (Each witness nodded affirmatively.)

Q. Did you note any prejudice toward them or any others involved in this relative to their color or their being black?

A. (Each witness nodded negatively.)

Q. You all say that you denoted no racial hostility, either expressed or implied, or any undertones of it?

A. (Each witness nodded negatively.)

Q. Was there any consideration at all in the indictments that they were black?

A. (By Witness Thornton) I think we were there for the consideration of the indictments and not the color. That wasn't brought up.

Q. You didn't know whether they were blacks or not?

A. (By Witness Thornton) I didn't.

THE COURT: Did any of you know that they were blacks?

A. (Each witness nodded negatively.)

WITNESS THORNTON: It wasn't specified.

THE COURT: Anything further?

[93] MR. CASH: Nothing further.

THE COURT: Thank you, lady and gentlemen, for being here today.

(Witnesses excused.)

THE COURT: Any further witnesses? Do you have any further matters you'd like to present, Mr. Proctor and Mr. Cash?

MR. CASH: None, to my knowledge.

THE COURT: Do you want to make any statements?

MR. CASH: We have these pre-trial motions that have been filed in this case, Your Honor. Should they be read at this time or does Your Honor want to go over them and read them?

GENERAL ABERNATHY: If Your Honor please, I believe right here, and in open Court, we can agree on most of these things.

THE COURT: Why don't we just go down them, kind of numerically, on these things.

GENERAL ABERNATHY: Is Your Honor ruling first on the Plea in Abatement? If Your Honor please, I would like to put one witness on for the State.

THE COURT: All right.

**[94]** Whereupon,

**H. M. PATRICK,**

was called as a witness, and after having been first duly sworn, was examined and testified as follows:

**Direct Examination**

BY GENERAL ABERNATHY:

Q. Mr. Patrick, you are the Circuit Court Clerk of Tipton County, and have been for how long?

A. About two and a half years.

Q. Mr. Patrick, the question has been raised about the systematic exclusion of members of the Negro race from jury duty in Tipton County. I have just one or two questions I want to ask you about that.

Do you recall the occasion, approximately two years ago, when a case wherein Donald Brooks, a member of the Negro race, had been indicted in Lauderdale County for the throat-cutting murder of a prominent white lady?

A. I do.



Q. And the case was transferred on application for change of venue by the defendant to Tipton County for trial? Do you recall that?

A. Yes, sir; I do, sir.

**[95]** Q. Do you recall that, upon the final selection of the 12 jurors who sat on that case, four of them were members of the Negro race?

A. I do, sir. I can name the names, if you'd like for me to.

Q. What do you personally know, Mr. Patrick—what's the average—or could you give us any idea about the average ratio of blacks to whites, whites to blacks, that occurs on practically ever panel that is selected for jury service here every four months?

A. With the ones that's drawn in my office?

Q. And what you've had an opportunity to observe here in the Courtroom?

A. Well, it's a good percentage of blacks to the whites. Now, I wouldn't want to——

Q. (Interrupting) Not a mathematical ratio, but has there been a very substantial number of members of the Negro race serving on Grand Juries and Trial Juries in Tipton County since you've been Clerk?

A. Every Court, sir.

Q. How long have you been Clerk, sir?

A. Since 1970.

GENERAL ABERNATHY: Thank you. That's all.

**[96]** THE COURT: Any questions?

MR. PROCTOR: No, sir.

(Witness excused.)

THE COURT: All right, sir. On the motion to suppress, the motion will be denied. Plea in Abatement will be denied.

STATE OF TENNESSEE

VS. No. 846

JESSEE FORD, JAMES NICHOLS, JR.
JAMES MITCHELL, THEODORE ROGERS

Motion to suppress is denied and plea in abatement is overruled. Court permits State to amend list of witnesses to be subpoenaed the names of L. M. Rose and Dan Jones of the Shelby County Sheriff's Department.

Thereupon, Court adjourned until March 19, 1973.

/s/ Herman L. Reviere
JUDGE

In the Court of Criminal Appeals of Tennessee
Jackson, March, 1974

| | |
|---|---|
| James Nichols, Jr. and James Mitchell, Plaintiffs-in-Error, v. State of Tennessee, Defendant-in-Error. | No. 1 Tipton County Hon. Herman L. Reviere, Judge (First Degree Murder) |

**For the Plaintiffs-in-Error:** Wilbur F. Cash and John E. Proctor, Covington, Tennessee

**For the Defendant-in-Error:** David M. Pack, Attorney General; Weldon B. White, Jr., Assistant Attorney General;



Will Terry Abernathy, District Attorney General; Preston Parks, Assistant District Attorney General

Opinion Filed: June 5, 1974

AFFIRMED

WILLIAM S. RUSSELL,
Judge

## OPINION

James Nichols, Jr., and James Mitchell, the plaintiffs-in-error, were jointly indicted in two separate indictments for the murder in the first degree of William Nabors and Claudie Greer. Plaintiffs-in-error were tried, found guilty of murder in the first degree, and sentenced to consecutive sentences of sixty years in the penitentiary in each case.

The murders arose out of the armed robbery by Nichols and Mitchell of a cafe in Tipton County. The lengthy record reflects that Nichols, with a pistol in each hand, informed the proprietor that it was a stickup and forced him to hand over the cash register receipts of about five or six hundred dollars. Nichols also took money from the person of the proprietor and others, fired several shots into the back room, and fled.

Simultaneously Mitchell, armed with a sawed-off shotgun, was in the back room of the cafe robbing some patrons who were engaged in a dice game. One of those gambling was William Nabors, who was shot in the mouth by Mitchell when Nabors bent over to pick up some change on the floor. Mitchell also went into the front room and took some money from the proprietress and then left. Claudie Greer was killed by a shot from a .38 calibre pistol. Witnesses in the back room testified they saw Greer fall after they heard a shot from the front room.

The extensive record contains the testimony of many eyewitnesses. All of them were in a good position to observe the

stickup men at close range over a considerable period of time, and all witnesses positively identified plaintiffs-in-error as the men who perpetrated these brutal murders. Nichols was later arrested with a .38 calibre pistol in his possession, and a sawed-off shotgun was found at the apartment of Mitchell's girl friend. In addition, the Memphis police were given a confession to the crime by Mitchell, the substance of which was related to the jury by the police officer who took it.

In view of the foregoing, we overrule the assignments of error attacking the legal sufficiency of the convicting evidence. It is the often-stated rule that this court cannot reverse on the facts unless the evidence is shown to preponderate against the verdict of the jury and in favor of the innocence of the accused. Plaintiffs-in-error have not made such a showing. *McBee v. State*, 213 Tenn. 15, 372 S.W.2d 173.

The third assignment states that it was error not to sustain the plea in abatement to the indictment because the proof showed that no Negro had ever served as foreman of the grand jury, and that the eligible grand jurors were selected from the telephone directory.

The Tipton County jury commissioners were put on the stand during the hearing on this matter, and they testified that they were aware of the need to select a proper racial balance and sought out the names of blacks they knew personally or by reputation. A sizable number of blacks and people of low income were shown to have in fact served on the jury panels. Past grand jury foremen testified as to the presence of blacks on the grand jury. A black who served on the grand jury who indicted plaintiffs-in-error testified that there was no hostility toward Negroes on the part of the other jurors. "The question of whether there has or has not been shown such a systematic exclusion of racial groups as to violate the rights of an accused is, necessarily, largely one of fact in each case." *State v. Johnson*, 220 Tenn. 49, 413 S.W.2d 694. The facts here do



not demonstrate a systematic exclusion of Negroes upon racial grounds, and the assignment of error is overruled.

Plaintiffs-in-error, in their fourth assignment of error, contend that it was error to fail to suppress the pistol and shotgun obtained as a result of their arrest, said arrest being without a warrant and no search warrant having been obtained.

T.C.A. § 40-803 permits an officer to make an arrest, without a warrant, when a felony has in fact been committed, and he has reasonable cause for believing the person arrested committed it. The facts show that the police had reasonable cause to believe plaintiffs-in-error had committed the Tipton County murders, and that they also knew that plaintiffs-in-error were to leave town the following day. Under the circumstances, an arrest was proper. The pistol was found incident to the arrest and was properly admitted into evidence. *Goodner v. State*, 3 Tenn.Crim.App. 569, 464 S.W.2d 339. It also appears that the officers were invited into the apartment to search by its owner, and a search with the permission of the owner is not an unreasonable search. *Deerfield v. State*, 220 Tenn. 546, 420 S.W.2d 649.

The *Deerfield* case also applies with respect to the seizure of the sawed-off shotgun, since it was found at another location pursuant to a search after the owners of the premises had voluntarily given the police permission to search.

The fifth assignment of error complains of the action of the trial court in consolidating for trial the two cases of murder. The cases were properly consolidated because both murders arose out of the robbery of White's Cafe by plaintiffs-in-error. When the offenses charged are similar, related, or connected such consolidation is proper. *State ex rel. Gann v. Henderson*, 221 Tenn. 209, 425 S.W. 2d 616.

The sixth assignment of error argues that it was error not to sever the trials of Mitchell and Nichols because a confession of

Mitchell was read to the jury. Plaintiff-in-error Nichols reasons that this confession, made in his absence, denied him the right to confront Mitchell who did not take the stand. Generally, the granting of a severance addresses itself to the sound discretion of the trial court, and we find no abuse of that discretion here. *O'Neil v. State*, 2 Tenn.Crim.App. 518, 455 S.W.2d 597. No reference to Nichols was made in the confession, and we do not think the jury was prejudiced against Nichols in hearing it. The test in granting a severance is a "likelihood of substantial prejudice" if tried together. *Hoskins v. State*, — Tenn.Crim.App. —, 489 S.W.2d 544. The facts in this case do not meet this test, and the motion for severance was properly denied.

Plaintiffs-in-error, who were indigent, requested a mental examination to determine if they were capable of defending the charges against them. In their seventh assignment of error, they say that it was error for the trial court to refuse to order such an examination. Both plaintiffs-in-error had been before the trial court prior to the request for the mental examination and had presented, pro se, a motion to suppress certain evidence. The trial court had other opportunities to observe them, and concluded that they were capable of conferring with counsel. We find no basis in the record for a holding of prejudicial error in denying the mental examination.

In the eighth assignment of error, plaintiffs-in-error complain of the trial court's failure to grant them a continuance until April 10, 1973 in order to locate additional witnesses who might have been helpful in their defense. Plaintiffs-in-error were indicted on November 6, 1972, and the actual trial commenced on March 21, 1973. The record shows that the trial court did grant a continuance to obtain additional defense witnesses, even bringing in one witness plaintiffs-in-error stated they needed but who was released prior to trial. Four other defense witnesses for whom a continuance had been granted were not put on by the defense.



We have held that a motion for continuance is within the sound discretion of the trial court, and we find no abuse of discretion in denying a continuance. *Frazier v. State*, 3 Tenn.Crim. App. 696, 466 S.W.2d 535. Under the facts in this case, we find that there was a reasonable time in which to prepare a defense, and further delay would have served no purpose. See *State ex rel. Leighton v. Henderson*, 1 Tenn.Crim.App. 598, 488 S.W.2d 82. No prejudice has been demonstrated.

The ninth assignment of error states that the trial court erred in granting a severance as to one Jesse Ford, a co-defendant indicted along with Nichols and Mitchell for the murder of Nabors and Greer. The plaintiffs-in-error contend that by severing Ford's case from theirs, they were deprived of possible help from Ford's testimony who because of his right against self-incrimination, could not be forced to testify against his will on their behalf. That this argument has no merit can readily be seen, since even had Ford been tried with plaintiffs-in-error, he would not have had to take the stand against his will.

The tenth and eleventh assignments of error attack the verdict as returned by the jury. Upon returning from their deliberations, the jury announced that they had found plaintiffs-in-error guilty of murder in the first degree as charged in the indictments, and fixed their punishment "at not less than 30 years and 1 day and not more than 60 years for each count; Nos. 846 and 847". The trial court recognized that this verdict was in improper form, since the indeterminate sentence law does not apply to the capital offenses of murder and rape. *Franks v. State*, 187 Tenn. 174, 213 S.W.2d 195.

Plaintiffs-in-error maintain that the trial court should have declared a mistrial when the jury returned the above verdict, and should not have given them further instructions with examples as to what form the verdict should be. We cannot agree. As was said in *State ex rel. Myers v. Brown*, 209 Tenn. 141, 351 S.W.2d 385, "The Court has the power, and it is

his duty, when a jury offers to return an informal or insufficient verdict, to send them back to the jury room with directions to amend it and put it in proper form". In light of the above, the trial court acted properly and the final two assignments of error are overruled.

Affirmed.

/s/ William S. Russell
Judge

CONCUR:

/s/ Mark A. Walker
Presiding Judge

/s/ W. Wayne Oliver
Judge

In the Supreme Court of Tennessee
At Jackson

James Nichols, Jr. and James Mitchell,
Petitioners,
v.
State of Tennessee,
Respondent.
} Tipton Criminal No. 1

**IN RE: PETITION FOR WRIT OF CERTIORARI OF JAMES NICHOLS, JR. AND JAMES MITCHELL**

(Filed March 10, 1975)

Upon connsideration of the petition, briefs, and the entire record in the cause, it is the judgment of this Court that the Court of Criminal Appeals has correctly dealt with the issue.

The writ is denied

PER CURIAM



James E. Mitchell 66684
Full name and Prison Number (if any) of Petitioner,

vs.

Jim H. Rose (Warden)
Name of Respondent
(Jailor, Warden).

} Case No. 75-222 (To be supplied by Clerk, U.S. District Court)

**PETITION FOR WRIT OF HABEAS CORPUS**

INSTRUCTIONS—READ CAREFULLY

In order for this petition to receive consideration by the District Court, it shall be legibly handwritten or typewritten, signed by the petitioner and verified (notarized), and it shall set forth in concise form the answer to each applicable question. If necessary, petitioners may complete the answer to a particular question on the reverse side of the page or on an additional blank page. Petitioner shall make clear which question any such continued answer refers to.

If you challenge more than one conviction or sentence, you must do so by separate petitions unless your claims for relief arise out of the same proceeding.

A petition is not a legal brief. Refer only to cases you were involved in leading up to this petition. You may file a separate memorandum of authorities.

Since every petition for habeas corpus must be sworn to under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Petitioners should, therefore, exercise care to assure that all answers are true and correct.

If the petition is taken *in forma pauperis* (on a pauper's oath) it shall include an affidavit (attached to the back of this form) setting forth information which establishes that petitioner will be unable to pay the fees and costs of the habeas corpus proceedings. Even though you may be allowed to file your petition on a pauper's oath, costs may be adjudged against you and execution issued if it later appears that you have sufficient funds.

When the petition is completed, the *original and two (2) copies* shall be mailed to:

Clerk, United States District Court
Western District of Tennessee
Federal Building
Memphis, Tennessee 38103

PETITIONS NOT CONFORMING TO THESE INSTRUCTIONS WILL BE RETURNED

1. Place of detension: Tennessee State Penitentiary.
2. Name and location of court which imposed sentence: Criminal Court of Tiption County Covington, Tennessee.
3. The indictment number, or numbers, if known, connected with the offense or offenses for which sentence was imposed:
   (a) NO 447
   (b) NO 448
   (c) ....
4. The date sentence was imposed and the terms of the sentence:
   (a) March 22, 1973
   (b) Sixty Years for 1st, deg murder
   (c) Sixty Years for Aid & abeding, Concetively.



5. Check whether finding of guilty was made:
   (a) after a plea of guilty ....
   (b) after a plea of not guilty X
   (c) after a plea of *nolo contendere* ....
6. If you were found guilty after a plea of not guilty, check whether that finding was made by:
   (a) a jury X
   (b) a judge without a jury
7. Did you appeal from the judgement of conviction or the imposition of sentence? Yes
8. If your answer to number 7 was "yes" list the following:
   (a) the name of each court you appealed to:
      I The Tennessee Criminal Court of Appeals
      II Tennessee State Supreme Court, Jackson, Tenn.
   (b) the results in each court you appealed to:
      I Affirmed
      II Affirmed
   (c) the date of each result:
      I June 5, 1974
      II March 10, 1975
   (d) citations of any written opinions or orders entered pursuant to such results, if known:
      I NON
      II NON
9. If your answer to number 7 was "no," give your reasons for not appealing:
10. Prior to this petition have you filed any of the following with respect to this conviction:
   (a) any petition for habeas corpus in state or federal courts? NON

(b) any petition in state court under any post conviction procedure laws? no

(c) any petition in state court by way of coram nobis? no

(d) any petition in the United States Supreme Court for certiorari other than petitions, if any, already given in answer to number 8? no

(e) any other petitions, motions or applications in this or any other court? no

11. If you answered "yes" to any part of number 10, list the following with respect to each petition, motion or application:

(a) the name and location of the court in which each petition, motion or application was filed:

I non

II non

III non

IV non

(b) the specific nature of each petition, motion or application:

I non

II non

III non

IV non

(c) the disposition of each petition, motion or application:

I NoN

II NoN

III NoN

IV NoN



(d) the date of each such disposition:

I NoN

II NoN

III NoN

IV NoN

(e) citations of any written opinions or orders entered pursuant to each such disposition, if known:

I NON

II NoN

III NoN

IV NoN

12. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully. Do not cite cases except those in which you were involved.

There is no evidence to support said verdicts.

The evidence preponderates against guilty verdicts and in favor of their innocence, (3) the court erred in not sustaining pleas in abatement of defendants alleging racial discrimination in the selecting of the foreman of the Grand Jury and Jury commissioners.

(4) The Court erred in not sustaining motion of defendants to supress exhibits of a .38 caliber pistol and a sawed-off shot gun obtained during their arrest without a criminal warrant.

(5) The Court erred in not sustaining application of defendants for separate trials in the two indictments charging them with first degree murders of Claudie Greer and Wm. A. Nabors.

(6) The alleged confession of James Mitchell incriminates by inference.

(7) The Court erred in not sustaining of petitions of defendants for a admission to a state Institution for mental observation and report to the Court under provision of SEC. 33-701, TCA.

(8) The Court erred in not continuing defendants' cases until April 16th 1973, in order for them to locate witnesses.

(9) The Court erred in granting motion for severance of the co-defendant Jesse Ford jointly indicted with defendants.

(10) The Court erred in not ordering a mistrial in said two cases when the jury returned a verdict finding defendants guilty of first-degree murder and setting their penalty at "not less than thirty (30) years and a day and not more than Sixty (60) years on each Count," and in ordering the jury to return to the jury room for further consideration of said case.

(11) The Court erred in calling the jury back from the jury room and giving them examples of possible maximum sentences they could impose upon said defendants in said case.

That the Trial Court erred in not granting defendant's motion for a new trial and both cases should be reversed and remanded to the lower Court for a new trial.

**State Concisely and in the same order the facts which support each of the grounds set out in number 12. Do not cite cases except those in which you were involved.**

I

The defendants James Nichols, Jr. and James Mitchell were arrested without criminal warrants or search warrants on October 29, 1972, in an apartment occupied by the States Witness, Antoinette Gilchrist, at 661 St. Paul, Memphis, Tennessee, who in response to knocks of police officers opened her apartment door which was entered by the officers, who made observation and first searched same before securing a consent from her (B.E. Vol. III pp. 164-167, 170-172).



II

A .38 caliber snubnose pistol and ring, subsequently made exhibits in the trial of the said cases, were obtained by the officers at the time of the search of the apartment at 661 St. Paul on October 29, 1972; and the said pistol was not identified as the pistol used at Sunny Mans Club in Tipton County, Tennessee, on October 28, 1972, in the commission of the crimes for which defendants James Nichols, Jr. and James Mitchell were indicted, tried and convicted (B. E. Vol. III pp 175, L77-181).

III

A sawed-off shotgun, obtained by officers on October 29, 1972, at the home of Mildred Jones and State witness, Eddie Mae Jones, at 1054 Claybrook, Memphis, Tennessee, as a result of a consent to search, was introduced as an exhibit at the trial of the defendants without being identified as the sawed off-shotgun used at Sunny Man's Club in Tipton County, Tennessee, on October 28, 1972, in the commission of the crimes for which these defendants were indicted, tried and convicted. The said shotgun was brought to the said home by a person other than either defendants James Mitchell or James Nichols, Jr. (B. E. Vol. III 181-184; 187).

IV

No witness who testified in regards to the allegations in the defendant's plea in abatement to the indictments indicated that a negro ever served as foreman of the grand jury in Tipton County, Tennessee, and the Jury Commissioners had selected the current jury panel, out of which the trial jury in these cases was chosen, from recently published telephone directories, selecting therefore only the persons, both black and white, whom they knew, either in person or by their reputations, and all others of both races were excluded (B. E. Vol. pp. 55-82).

V

Defendant James Nichols, Jr. was not present in the Security Unit in John Gaston Hospital, Memphis, Tennessee, shortly after October 28, 1972, when defendant James Mitchell allegedly made an admission that on October 28, 1972 he took a sawed-off shotgun and went into Sunny Man's Club in Tipton County, Tennessee, and shot twice, but did not know if he killed anyone; and defendant James Mitchell did not testify as a witness in his own behalf in the trial of the said two cases, wherein he was jointly tried with defendant James Nichols, Jr. (B. E. Vol. III 297-300; B. E. Vol. IV 303-307).

VI

After the charge of the Trial Court the trial jury, who had jointly tried defendants James Nichols, Jr. and James Mitchell in said two consolidated cases, retired to the jury room, and after deliberating therein, returned to the courtroom and announced to the Court they had found said defendants guilty of first degree murder and set the penality for each of the defendants at not less than 30 years and 1 day and not more than 60 years for each count. Nos. 846 and 847. The Trial Judge accepted their findings of guilt but asked the jury to retire once again and fix the maximum punishment only for each defendant in each case, whereupon he read to them again the punishment. The jury again retired but were recalled to the court room where the Trial Judge charged them that they may fix the punishment at life in the Penitentiary or at any number of years between 20 years and a day, 30 years, 40 years, 60 years, 75 years, 99 years, or any other number of years above 20 years (B. E. Vol. IV, pp 353-360).

VII

After the foregoing instructions by the Trial Court the jury again retired deliberated and returned with a verdict stating: "we, the



jury, find James Nicholas, Jr. and James Mitchell guilty of First Degree Murder on two counts; Nos. 846 and 847, and set the penalty for each of the defendants at a maximum of 60 years on count NO. 846 and set the maximum penality for each of the defendants at a maximum of 60 years on Count NO. 847" (B. E. Vol. 4, p 359).

14. Has any ground set forth in number 12 been previously presented to this or any other court, state or federal, in any petition, motion or application? Non

15. If your answer to number 14 is "yes" identify:

(a) which grounds have previously presented:

I Non
Non

II Non
Non

III Non
Non

(b) the proceedings in which each ground was raised;

I Non
Non

II Non
Non

III Non
Non

16. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? Yes

(b) Your trial, if any? Yes

(c) your sentencing? Yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes

(e) Preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction? Yes

17. If the answer to any part of number 16 was "yes" list the following:

(a) the name and address of each attorney who represented you:

I Wilbur Cash, 104-106 Abernathy Bldg. Covington, Tennessee.

II .....

.....

II .....

.....

III .....

.....

(b) the proceeding in which such attorney represented you:

II All of the above mentionings

II .....

III .....

18. If you are seeking leave to proceed *in forma pauperis* (on a pauper's oath), have you completed the sworn affidavit setting forth the required information (see instructions at the beginning of this form)? Yes

/s/ JAMES E. MITCHELL
(Signature of Petitioner)



In the United States District Court
For the Western District of Tennessee
Western Division

James E. Michell,
Petitioner,
v.
Jim H. Rose, Warden,
Respondent.
Civil C-75-222

**ORDER TO SHOW CAUSE**

(Filed May 19, 1975)

It appearing that James E. Mitchell, who is a prisoner of the State of Tennessee, has filed a petition for writ of habeas corpus attacking his conviction and sentence imposed in the Criminal Court of Tipton County, Tennessee;

It is ORDERED that respondent show cause why the writ and the relief prayed for in the petition should not be granted and, good cause appearing, respondent is allowed 23 days in which to answer.

It is further ORDERED that respondent file with his answer a copy of the technical record and trial transcript as well as any opinions on appeal of the conviction.

ENTER this 19th day of May, 1975.

/s/ BAILEY BROWN
CHIEF JUDGE

(Illegible)

(Illegible)
/s/ By (Illegible)
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

James E. Mitchell, Petitioner

vs.

Jim H. Rose, Warden, Respondent

Civil No. C-75-222

## RESPONSE TO ORDER TO SHOW CAUSE

Comes the respondent, Jim H. Rose, Warden, and makes response to the Order of the Court, filed May 19, 1975, to show cause why the Writ of Habeas Corpus and the relief prayed for in this cause should not be granted. The Writ should be denied, and the relief sought should not be granted.

### Exhaustion of State Remedies

Although the Petition shows on its face (p. 3) that the petitioner has sought no relief under Tennessee's Post-Conviction Procedure Act, this Petition is a paraphrase of the Assignments of Error filed by the petitioner upon his direct appeal, and passed upon by appellate courts of Tennessee. Therefore, the petitioner has exhausted his remedies at state law before commencing this action.[1]

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[1] *See Arthur v. State*, 483 S.W.2d 95 (Tenn. 1972).



### Grounds for Petition

I-II

"1. **There is no evidence to support said verdict."**

"2. **The evidence preponderates against guilty verdicts and in favor of their innocence."**

These two grounds allege insufficient evidence for conviction. Unless there is a near-complete absence of evidence, this is not a ground upon which federal Habeas Corpus Relief may be granted.[2] The trial transcript in this case clearly shows that there was ample evidence, based upon personal identification of the petitioner by numerous witnesses and upon his confession, that he personally shot one man to death while participating in a robbery during which another man was also shot and killed. There is no merit, therefore, to this asserted ground.

III

"3. **The Court erred in not sustaining pleas in abatement of defendants alleging racial discrimination in the selection of the foreman of the Grand Jury and Jury Commissioners."**

The Trial Judge conducted a hearing on the question of racial discrimination in the selection of grand jurors and jury commissioners, which is found at Volume I, pp. 54-96. Evidence presented in that hearing shows that grand jurors were aware of the need to avoid racial discrimination, and that they did all that they could to assure that blacks whom they knew to be of good character were included as grand jurors. Finally, there was testimony that there was no hostility whatever among the grand

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[2] *Casias v. Patterson*, 398 F.2d 486 (10th Cir. 1968), *cert. denied*, 393 U.S. 1108.

jurors toward the petitioner because of his race. The petitioner has failed to carry his burden of proof that there was systematic exclusion of blacks from the grand jury which indicted him.[3]

IV

**"4. The Court erred in not sustaining motion of defendants to surpress exhibits of a .38 caliber pistol and a sawed-off shot gun obtained during their arrest without a criminal warrant."**

This ground of the Petition is without merit. The Trial Court conducted a hearing on the legality of these two searches which resulted in the seizure of a pistol, a ring, and a shotgun (Vol. I, pp. 6-53, 96). Testimony in that hearing showed that in response to a telephone call by a reliable informant to Memphis police, made late at night, saying that the men who had committed the murders in Tipton County were at a certain address and that they were going to leave town in the morning, the police went directly to the address given, since there was not time for them to obtain a warrant. They knocked on the door and were admitted, and as they walked in they saw the co-defendant of this petitioner standing in the apartment with a pistol in his hand. They obtained a consent to search the premises from the lessee, and did so, arresting this petitioner and seizing the pistol and a ring taken in the robbery. Later, upon obtaining consent to search another apartment, they went there and found a shotgun left there by this petitioner. It is obvious from the Record that no unreasonable search or seizure was made, and the evidence seized was properly admitted. The police acted with reasonable cause to believe that the men in the first apartment were the murderers sought, and they lawfully entered the apartment to arrest them, after which entry the ring and the pistol were in plain view, and the pistol was near enough that its seizure was the result of a search incident to the lawful arrest of the men.

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[3] *Swain v. Alabama*, 380 U.S. 202 (1965).



It also is clear that the men were admitted to the apartment by the tenant, who also signed a consent to the search. A question was raised regarding at what time during the search the consent had been signed, but this cannot be material since a consent made during a search is a more informed consent than one made before a search. In addition, the second search, during which the shotgun used by the petitioner to kill his victim was seized, was made at the instance of the tenant and with her signed consent. The petitioner was deprived of no constitutional or statutory right by the actions of the police during these searches.

In summary, the search was made upon probable cause, [4] and it can also be justified as incident to a lawful arrest,[5] and during which the items were in plain view. [6] In addition, the searches were made with the consent of the person with the right to control the premises, [7] and the petitioner lacked standing to complain of the search. [8]

V

**"5. The Court erred in not sustaining application of defendants for separate trials in the two indictments charging them with first degree murders of Claudie Greer and Wm. A. Nabors."**

This contention is without merit, the petitioner having failed to point out any prejudice, much less deprivation of constitutional rights, caused by his trial with James Nichols.

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[4] *U.S. v. McKinney*, 379 F.2d 259 (6th Cir. 1967).

[5] *U.S. v. Manarite*, 448 F.2d 583 (2d Cir. 1971), *cert. denied*, — U.S. —.

[6] *U.S. v. Glassel*, 448 F.2d 143 (9th Cir. 1973), *cert. denied*, 416 U.S. 941.

[7] *McCravy v. Moore*, 476 F.2d 281 (6th Cir. 1973).

[8] *See U.S. v. Hearn*, 496 F.2d 236 (6th Cir. 1974), *cert. denied*, — U.S. —.

VI

"6. **The alleged confession of James Mitchell incriminates by inference, jam James [Nichols], Jr. who was not present.**"

This contention is without merit; it could be asserted only by James Nichols, and not by this petitioner, James Mitchell, who is the one who made the confession.

VII

"7. **The Court erred in not sustaining of [petitions of] defendants for a admission to a state Institution for mental observation and report to the Court under provision of SEC. 33-701, T. C. A.**"

The Trial Judge conducted a hearing on this question, the Record of which is found at pp. 1-16, which begins following page 104 of Volumn I of the Record. This would not be a ground for Habeas Corpus Relief unless a defendant were so mentally incapable of participating in his trial and putting forth his best defense that it was a denial of due process of law. It is apparent from the Record that the petitioner participated fully in his defense, and that the Trial Judge was within his discretion in holding that the petitioner was competent to stand trial.

VIII

"8. **The Court erred in not continuing defendants' cases until April-16th 1973, in order for them to locate witnesses.**"

This contention is without merit, the petitioner having failed to show that he was prejudiced in any way by the Trial Court's failure to order an additional continuance so that the petitioner and his co-defendant could locate other witnesses whom they



claimed to exist. The Trial Court's efforts to accomodate the defendants' requests for additional witnesses are shown in the Record at Vol. II, pp. 2-33, Vol. IV, pp. 318-319. The witnesses whom the defendant did call, Lonnie Williams (Vol. IV, p. 308) and James Jackson (B. E. 320), were unable to add anything to their defense. There was no showing at the time, and there is no showing now, that there is in existence any person who can add anything to the defense of the petitioner. The Trial Court's refusal to continue the trial indefinitely, to indulge the petitioner's hope that some elusive witness might some day be found, did not deprive the petitioner of any constitutional or statutory right.

IX

9. **The Court erred in granting motion for severance of the co-defendant Jesse Ford jointly indicted with defendants.**"

The petitioner has not shown any way in which he was prejudiced by the severance of Jesse Ford.

X-XI

"10. **The Court erred in not ordering a mistrial in said two cases when the jury returned a verdict finding defendants guilty of first-degree murder and setting their penalty at "not less than thirty (30) years and a day and not more than sixty (60) years on each count," and in ordering the jury to return to the jury room for further consideration of said case.**"

"11. **The Court erred in calling the jury back from the jury room and giving them examples of possible maximum sentences they could impose upon said defendant in said case.**"

These grounds allege constitutional error in the Trial Court's handling of the jury's erroneous sentence. The jury first announced that it had found the petitioner and his co-defendant

guilty of first-degree murder, and that it had set a sentence of not less than thirty (30) years nor more than sixty (60) years of each of the two counts. This sentence was inconsistent with the verdict: the sentence was in "indeterminate" form, which is required for sentences for some crimes by T.C.A. § 40-2707. That statute applies only to offenses for which punishment must be set "within minimum and maximum terms." The punishment precribed for conviction of first-degree murder, however, is not in this form, because there is no maximum term set by the Act. Therefore, T.C.A. § 40-2707 does not apply where a conviction is for first-degree murder.[9] When the jury announced that it had found the defendant guilty of first-degree murder, yet expressed its sentence in indeterminate form, the Trial Judge therefore had to send the jury back for reconsideration of the punishment. After reconsidering the matter, the jury returned its sentence in the correct form, and it was properly accepted by the Trial Court. This is no ground for Habeas Corpus relief; the practice, which has been approved by the appellate courts of Tennessee,[10] is a reasonable method of meeting such a problem. The jury had reached a verdict on the guilt of the defendant, and there was no reason to think that that verdict would change just because the sentence would have to be changed; if the jury had felt that it would have said so at the announcement of the second sentence.

**Summary**

The petitioner has shown no deprivation of constitutional or statutory right which would entitle him to federal Habeas Corpus Relief. The respondent respectfully suggests that the Record of the petitioner's trial is sufficient for the determination of all matters raised in this Petition, and that no evidentiary hearing will be required in this cause.

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[9] *Miller v. State*, 520 S.W.2d 729 (Tenn. 1975).

[10] *Jenkins v. State*, 509 S.W.2d 240 (Tenn. Crim. App. 1974).



WHEREFORE, PREMISES CONSIDERED, THE RESPONDENT PRAYS THAT THIS ACTION BE DISMISSED.

Respectfully submitted,

/s/ TOM JENNINGS
Assistant Attorney General
414 Supreme Court Building
Nashville, Tennessee 37219
(615) 741-2250

**Certificate of Service**

I hereby certify that I mailed a copy of this Response to Mr. James E. Mitchell, No. 66684, Tennessee State Penitentiary, Nashville, Tennessee, this 9 day of June, 1975.

/s/ TOM JENNINGS
Assistant Attorney General

James H. Nichols Jr. 58054
Full Name and Prison Number (if any) of Petitioner

vs.

Jim H. Rose, Warden
Name of Respondent (Jailor, Warden).

Case No. C-75-265 (To be supplied by Clerk, U.S. District Court)

**PETITION FOR WRIT OF HABEAS CORPUS**

(Filed June 11, 1975)

INSTRUCTIONS—READ CAREFULLY

In order for this petition to receive consideration by the District Court, it shall be legibly handwritten or typewritten, signed by the petitioner and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, petitioner may complete the answer to a particular question on the reverse side of the page or on an additional blank page. Petitioner shall make clear which question any such continued answer refers to.

If you challenge more than one conviction or sentence, you must do so by separate petitions unless your claims for relief arise out of the same proceeding.

A petition is not a legal brief. Refer only to cases you were involved in leading up to this petition. You may file a separate memorandum of authorities.

Since every petition for habeas corpus must be sworn to under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Petitioners should, therefore, exercise care to assure that all answers are true and correct.



If the petition is taken *in forma pauperis* (on a pauper's oath) it shall include an affidavit (attached to the back of this form) setting forth information which establishes that petitioner will be unable to pay the fees and costs of the habeas corpus proceedings. Even though you may be allowed to file your petition on a pauper's oath, costs may be adjudged against you and execution issued if it later appears that you have sufficient funds.

When the petition is completed, the *original and two (2) copies* shall be mailed to:

Clerk, United States District Court
Western District of Tennessee
Federal Building
Memphis, Tennessee 38103

PETITION NOT CONFORMING TO THESE INSTRUCTIONS WILL BE RETURNED

• • • • • • • •

2. Name and location of court which imposed sentence: Criminal Court of Tipton County, Covington, Tennessee

3. The indictment number, or numbers, if known, connected with the offense or offenses for which sentence was imposed:

   (a) NO. 447

   (b) NO. 448

   (c) .....

4. The date sentence was imposed and the terms of the sentence:

(a) March 22, 1973

(b) Sixty Years for First deg. Murder

(c) Sixty Years for abeding, Consecutively

5. Check whether a finding of guilty was made:

(a) after a plea of guilty .....

(b) after a plea of not guilty X

(c) after a plea of *nolo contendere*

5. If you were found guilty after a plea of not guilty, check whether that finding was made by:

(a) a jury X

(b) a judge without a jury .....

7. Did you appeal from the judgment of conviction or the imposition of sentence? Yes

8. If your answer to number 7 was "yes" list the following:

(a) the name of each court you appealed to:

I Tennessee Criminal Court of Appeals
II Tennessee State Supreme Court, Jackson, Tenn.

(b) the result in each court you appealed to:

I Affirmed

II Affirmed

(c) the date of each such result:

I June 5, 1974

II March 10, 1975

(d) citations of any written opinions or orders entered pursuant to such results, if known:

I Non
II Non



9. If your answer to number 7 was "no," give your reasons for not appealing: Non

10. Prior to this petition have you filed any of the following with respect to this conviction:

(a) any petition for habeas corpus in state or federal courts? Non

(b) any petition in state court under any post conviction procedure laws? Non

(c) any petition in state court by way of *coram nobis*? Non

(d) any petition in the United States Supreme Court for certiorari other than petitions, if any, already given in answer to number 8? Non

(e) any other petitions, motions or applications in this or any other court? Non

11. If you answered "yes" to any part of number 10, list the following with respect to each petition, motion or application:

(a) the name and location of the court in which each petition, motion or application was filed:

I Non

II Non

III Non

IV Non

(b) the specific nature of each petition, motion or application:

I Non

II Non

III Non

IV Non

(c) the disposition of each petition, motion or application

I Non
II Non
III Non
IV Non

(d) the date of each such disposition:

I Non
II Non
III Non
IV Non

(e) citations of any written opinions or orders entered pursuant to each such disposition, if known:

I Non
II Non
III Non
IV Non

12. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully. Do not cite cases except those in which you were involved.

1

There is no evidence to support said verdict in each of the above styled and numbered cases.

2

The evidence perponderates against the verdict of guilt and in favor of the innocence of the defendants James Nichols, Jr. and James Mitchell, in each of the above styled and numbered cases.



3

The Court erred in not sustaining the pleas in abatement of said defendants James Nichols, Jr. and James Mitchell to the indictments in each of the above styled and numbered cases on the grounds of discrimination the Uncontradicted evidence showing that no negro has ever serevd as foreman of the Grand Jury of Tipton County, Tennessee, and the jury commissioners selected the current eligible jurors from telephone directories thus eliminating the poor class of persons who have no telephone as well as persons with unlisted telephone numbers.

4

The Court erred in not sustaining the motion of defendants James Nichols, Jr. and James Mitchell to supress the introduction by the State of Exhibits of a 38. caliber pistol and a sawed-off shotgun by officers which were obtained during the course of an arrest without a criminal warrant or a search warrant for alleged offenses not committed in the presence of the arresting officers.

5

The Court erred in not sustaining the application of the said defendants James Nichols, Jr. and James Mitchell for separate trials in the above styled and numbered cases, One indictment charging said defendants and others with the murder of one Claudie Greer and the other indictment charging said two defendants and other with the murder of one William Nabors.

6

The Court erred in not sustaining the application of said defendants James Nichols, Jr. and James Mitchell, for severance of their

trial in each of the above styled numbered cases as testimony was subsequently introduced by an officer testifying for the State of an alleged confession or admission on part of the defendant James Mitchell which was not made in the presence or hearing of the defendant James Nichols, Jr. and as defendant James Mitchell did not take the witness stand to testify in his own behalf, this evidence was to some extent incriminating against defendant James Nichols, Jr. who testified in his own behalf.

7

The Court erred in not sustaining the petition of the attorneys of record for the defendants James Nichols, Jr. and James Mitchell praying for said two to be admitted to some appropriate State Institution for a period not exceeding 30 days for observation and to report to the Court on their mental condition under the provision of Code Section 33-701 of the Tennessee Code Annotated.

8

The Court erred in not granting the motion of defendants James Nichols, Jr. to continue their cases until April 16, 1973, in order to give them additional time in which to locate the addresses of witnesses which might have been helpful in their defense.

9

The Court erred in granting the motion of Jesse Ford, a codefendant of the defendants James Nichols, Jr. and James Mitchell and who was jointly indicted with said two defendants in each of the above styled and numbered cases from their cases, thus depriving defendants James Nichols, Jr., and James Mitchell of possible help from the testimony of said co-defendant Jesse



Ford who because of his constitutional rights against self incrimination could not be forced to testify in behalf of the defendants James Nichols, Jr. and James Mitchell.

10

The Court erred in not ordering a mistrial of the above styled and numbered cases after the jury returned a verdict finding defendants James Nichols, Jr. and James Mitchell guilty of first degree murder and setting their penalty at "not less than 30 years and a day and not more than sixty years on each count," and in ordering the jury to return to the jury room for a further consideration of the above styled and numbered cases.

11

The Court erred in calling the jury back from the jury room and giving them further instruction especially examples of possible maximum sentencing which they could impose upon the defendants in each of the above cases.

**State concisely and in the same order the facts which support each of the grounds set out in number 12, do not cite cases except those in which you were involved**

I

The defendants James Nichols, Jr. and James Mitchell were arrested without a criminal warrant or search warrant on October 29, 1972, in an apartment occupied by the State's witness, Antoinette Gilchrist, at 661 St. Paul, Memphis Tennessee, who in response to knocks of police officers opened her apartment door which was entered by officers, who made observation and first searched same before securing a consent to search from her (B.E. Vol. III pp 164-167, 170-172).

2

A 38. caliber pistol and a ring, subsequently made exhibits in the trial of said cases, were obtained by officers at the time of the said search of the apartment at 661 St. Paul on October 29, 1972; and said pistol was not identified as the pistol used at Sunny Man's Club in Tipton County, Tennessee, on October 28, 1972 in the commission of the crime for which defendants James Nichols, Jr. and James Mitchell were indicted, tried and convicted. (B.E. Vol. III pp 178, 177-181).

3

A sawed-off shotgun, obtained by officers on October 30, 1972, at the home of Mildred Jones and State witness, Eddie Mae Jones, at 1054 Claybrook, Memphis, Tennessee, as a result of a consent to search, was introduced as an exhibit at the trial of the defendants without being identified as the sawed off shotgun used at Sunny Man's Club in Tipton County, Tennessee, on October 28, 1972, in the commission of the crime for which these defendants were indicted, tried, and convicted. The said shotgun was brought to the said home by a person other than either defendants James Nichols, Jr. and James Mitchell. (B.E. Vol. III pp 181-184, 187);

4

No witness who testified in regards to the allegations in the defendants' plea in abatement to the indictments indicated that a negro ever served as foreman of the Grand jury in Tipton County, Tennessee, and the jury commissioner had selected the current jury panel, out of which the trial jury in these cases was chosen, from recently published telephone directories, selecting therefore only the persons, both black and whites, whom they knew either in person or by their reputations, and all other of both races were excluded (B.E. Vol. I pp. 55-82).



5

Defendant James Nichols, Jr., was not present in the security unit in John Gaston Hospital, Memphis, Tennessee, shortly after October 28, 1972, when defendant James Mitchell allegedly made an admission that on October 28, 1972, he took a sawed-off shotgun and went into Sunny Man's Club in Tipton County, and defendant James Mitchell did not testify as a witness in his behalf in the trial of the said cases wherein he was jointly tried with defendant James Nichols, Jr. (B.E. Vol. IV 303-307).

6

After the charge of the Trial Court the trial jury who had jointly tried defendants James Nichols, Jr. and James Mitchell in said two consolidated cases, retired to the jury room, and after deliberations therein, returned to the courtroom and announced to the Court they had found said defendants guilty of first degree murder and set the penalty for each of the defendants at not less than thirty years and one day and not more than sixty years for each count, Nos. 846 and 847. The Trial Judge accepted their findings of guilt but asked the jury to retire once again and fix the maximum punishment only for each defendant in each case, whereupon he read them again the punishment at life in the penitentiary or at any number of years between 20 years and a day and life, that is, that is, 20 years and a day, 30 years, 40 years, 60 years, 75 years, 99 years, or any other number of years above 20 years. (B.E. Vol. IV, pp 353-360)

7

After the foregoing instruction by the Trial Court, the jury again retired (Illegible) Nichols, Jr. and James Mitchell guilty of first

degree murder on two counts; Nos. 847 and 848, and set the penalty for each of the defendants at a maximum penalty for each of the defendants at a maximum of sixty years on count No. 847" (B.E. Vol. 4, p. 359).

14. Has any ground set forth in number 12 been previously presented to this or any other court, state or federal, in any petition, motion or application? No

15. If your answer to number 14 is "yes" identify

(a) which grounds have been previously presented

I Non
Non

II Non
Non

III Non
Non

(b) the proceedings in which each ground was raised

I Non
Non

II Non
Non

III Non
Non

16. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? No

(b) your trial, if any? Yes

(c) your sentencing? Yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes



(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction? Yes

17. If your answer to any part of number 16 was "yes" list the following:

(a) the name and address of each attorney who represented you:

I Wilbur Cash—106 Abernathy Bldg.
Covington

II All of the above mentionings

. . . . . .

III . . . . . .

. . . . . .

(b) the proceeding in which such attorney represented you:

I . . . . . .

II . . . . . .

III . . . . . .

18. If you are seeking leave to proceed *in forma pauperis* (on a pauper's oath), have you completed the sworn affidavit setting forth the required information (see instructions at the beginning of this form)? Yes

/s/ JAMES NICHOLS, JR. 58054
(Signature of Petitioner)

In the United States District Court
For the Western District of Tennesee
Western Division

James Nichols, Jr., Petitioner,
v.
Jim H. Rose, Warden, Respondent.
Civil C-75-265

**ORDER TO SHOW CAUSE**

(Filed June 13, 1975)

It appearing that James Nichols, Jr. has filed a petition for writ of habeas corpus, it is ORDERED that respondent show cause why the petition and the relief prayed for therein should not be granted, and good cause appearing, respondent is allowed 23 days in which to answer.

It appears that petitioner was a codefendant in the Criminal Court of Tipton County with James E. Mitchell, who has filed a habeas petition in this court (C-75-222) as to which respondent has answered, and the technical record, transcript, etc. have been filed along with the answer. It will therefore not be necessary for respondent to attach such documents to his answer in this cause and this cause will be consolidated with C75-222 for handling.

It is so ORDERED.

ENTER this 11th day of June, 1975.

/s/ (Illegible)
CHIEF JUDGE



In the United States District Court
For the Western District of Tennessee
Western Division

James Nichols, Jr.
vs.
Jim H. Rose, Warden
Civil No. C-75-265

**RESPONSE TO ORDER TO SHOW CAUSE**

Comes the respondent, Jim H. Rose, Warden, and makes response to the Order of the Court, filed June 11, 1975, to show cause why the Writ of Habeas Corpus and the relief prayed for in this cause should not be granted. The Writ should be denied, and the relief sought should not be granted.

**Exhaustion of State Remedies**

Although the Petition shows on its face (p. 3) that the petitioner has sought no relief under Tennessee's Post-Conviction Procedure Act, this Petition is a paraphrase of the Assignments of Error filed by the petitioner upon his direct appeal, and passed upon by appellate courts of Tennessee. Therefore, the petitioner has exhausted his remedies at state law before commencing this action.[1]

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[1] *See Arthur v. State*, 483 S.W.2d 95 (Tenn. 1972).

## Responses to Grounds for Petition

### I-II

**There Is Evidence to Support the Verdict and the Evidence Does Not Preponderate Against the Verdict of Guilt and in Favor of the Innocence of the Petitioner.**

These two grounds allege insufficient evidence for conviction. Unless there is a near-complete absence of evidence, this is not a ground upon which federal Habeas Corpus Relief may be granted.[2] The trial transcript in this case clearly shows that there was ample evidence, based upon personal identification of the petitioner by numerous witnesses and upon his confession, that he personally shot one man to death while participating in a robbery during which another man was also shot and killed. There is no merit, therefore, to this asserted ground.

### III

**The Court Did Not Err in Dismissing the Petitioner's Plea in Abatement to His Indictment, Which Was Based Upon a Claim of Racial Discrimination in the Selection of the Foreman of the Grand Jury and of the Jurors Themselves.**

The Trial Judge conducted a hearing on the question of racial discrimination in the selection of grand jurors and jury commissioners, which is found at Volume I, pp. 54-96. Evidence presented in that hearing shows that grand jurors were aware of the need to avoid racial discrimination, and that they did all that they could to assure that blacks whom they knew to be of good character were included as grand jurors. Finally, there was testimony that there was no hostility what-

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[2] *Casias v. Patterson*, 398 F.2d 486 (10th Cir. 1968), *cert. denied*, 393 U.S. 1108.



ever among the grand jurors toward the petitioner because of his race. The petitioner has failed to carry his burden of proof that there was systematic exclusion of blacks from the grand jury which indicted him.[3]

### IV

**The Court Did Not Err in Overruling the Petitioner's Motion to Suppress the Introduction Into Evidence of a Pistol and a Sawed-off Shotgun Seized at the Arrest of the Petitioner.**

This ground of the Petition is without merit. The Trial Court conducted a hearing on the legality of these two searches which resulted in the seizure of a pistol, a ring, and a shotgun (Vol. I, pp. 6-53, 96). Testimony in that hearing showed that in response to a telephone call by a reliable informant to Memphis police, made late at night, saying that the men who had committed the murders in Tipton County were at a certain address and that they were going to leave town in the morning, the police went directly to the address given, since there was not time for them to obtain a warrant. They knocked on the door and were admitted, and as they walked in they saw this petitioner, James Nichols, standing in the apartment with a pistol in his hand. They obtained consent to search the premises from the tenant, and did so, arresting this petitioner and seizing the pistol and a ring taken in the robbery. Later, upon obtaining consent to search another apartment, they went there and found a shotgun left there by Mitchell. It is obvious from the Record that no unreasonable search or seizure was made, and the evidence seized was properly admitted. The police acted with probable cause to believe that the men in the first apartment were the murderers sought, and they lawfully entered the apartment to arrest them, after which entry the ring and the pistol were in plain view, and the pistol was near enough that its seizure was the result of a

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[3] *Swain v. Alabama*, 380 U.S. 202 (1965).

search incident to the lawful arrest of the men. It also is clear that the men were admitted to the apartment by the tenant, who also signed a consent to the search. A question was raised regarding at what time during the search the consent had been signed, but this cannot be material since a consent made during a search is a more informed consent than one made before a search. In addition, the second search, during which the shotgun used by Mitchell to kill his victim was seized, was made at the instance of the tenant and with her signed consent. The petitioner was deprived of no constitutional or statutory right by the actions of the police during these searches.

In summary, the search was made upon probable cause,[4] and it can also be justified as incident to a lawful arrest,[5] and during which the items were in plain view.[6] In addition, the searches were made with the consent of the person with the right to control the premises,[7] and the petitioner lacked standing to complain of the searches.[8]

V

**The Court Did Not Err in Refusing to Sever the Trial of the Petitioner and His Co-Defendant, James E. Mitchell.**

This contention is without merit, the petitioner having failed to point out any prejudice, much less deprivation of constitutional rights, caused by his trial with James E. Mitchell.

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[4] *U.S. v. McKinney*, 379 F.2d 259 (6th Cir. 1967).

[5] *U.S. v. Manarite*, 448 F.2d 583 (2d Cir. 1971), *cert. denied*, — U.S. —.

[6] *U.S. v. Glassel*, 448 F.2d 143 (9th Cir. 1973), *cert. denied*, 416 U.S. 941.

[7] *McCravy v. Moore*, 476 F.2d 281 (6th Cir. 1973).

[8] *See U.S. v. Hearn*, 496 F.2d 236 (6th Cir. 1974), *cert. denied*, — U.S. —.



VI

**The Court Did Not Err in Allowing Into Evidence Testimony as to the Substance of James E. Mitchell's Confession.**

This contention is without merit. The Record shows (B.E. 305-06) that Lt. L. M. Rose testified that James Mitchell made a statement in which he incriminated himself in the shootings which resulted in the deaths of the two victims. No reference was made in this testimony to any other persons who might have been with James Mitchell at the time. Because of the careful excision of any reference to James Nichols, the petitioner herein, he could not have been prejudiced by the admission of the testimony of the contents of James Mitchell's statement.[9]

VII

**The Trial Court Did Not Err in Denying the Petitioner's Request for a Mental Evaluation.**

The Trial Judge conducted a hearing on this question, the record of which is found at pp. 1-16, which begins following page 104 of Volume I of the Record. This should not be a ground for Habeas Corpus Relief unless a defendant were so mentally incapable of participating in his trial and putting forth his best defense that it was a denial of due process of law. It is apparent from the Record that the petitioner participated fully in his defense, and that the Trial Judge was within his discretion in holding that the petitioner was competent to stand trial.

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[9] *Brown v. U.S.*, 411 U.S. 223, 93 S. Ct. 1565, 36 L.Ed.2d 208 (1973) (harmless error); *United States ex rel. Smith v. Montanye*, 505 F.2d 1355 (2d Cir. 1974) (statement cumulative); *United States v. Wilson*, 500 F.2d 715 (5th Cir. 1974) (Court excised incriminating portions).

VIII

**The Court Did Not Err in Refusing to Continue the Petitioner's Trial to Give Him Additional Time in Which to Locate Witnesses.**

This contention is without merit, the petitioner having failed to show that he was prejudiced in any way by the Trial Court's failure to order an additional continuance so that the petitioner and his co-defendant could locate other witnesses whom they claimed to exist. The Trial Court's efforts to accommodate the petitioners' request for additional witnesses are shown in the Record at Vol. II, pp. 2-33, Vol. IV, pp. 318-319. The witnesses whom the defendants did call, Lonnie Williams (Vol. IV, p. 308) and James Jackson (Vol. IV, 320), were unable to add anything to their defense. There was no showing at the time, and there is no showing now, that there is in existence any person who can add anything to the defense of the petitioner. The Trial Court's refusal to continue the trial indefinitely, to indulge the petitioner's hope that some elusive witness might some day be found, did not deprive the petitioner of any constitutional or statutory right.

IX

**The Trial Court Did Not Err in Severing Jesse Ford and Trying Him Separately From the Petitioner.**

No prejudice has been shown from this action of the Trial Court.



X-XI

**The Court Did Not Err in Refusing to Declare a Mistrial When the Jury Returned a Verdict Finding the Petitioner and His Co-Defendant Guilty of First-Degree Murder and Sentencing Them to Imprisonment for Not Less Than Thirty (30) Years and One (1) Day, Nor More Than Sixty (60) Years on Each Count, and the Court Did Not Err, in Instructing the Jury to Reconsider Its Verdict, in Giving the Jury Examples of Acceptable Sentences Which Could Be Imposed.**

These grounds allege constitutional error in the Trial Court's handling of the jury's erroneous sentence. The jury first announced that it had found the petitioner and his co-defendant guilty of first-degree murder, and that it had set a sentence of not less than thirty (30) years and one day nor more than sixty (60) years upon each of the counts. This sentence was inconsistent with the verdict: the sentence was in "indeterminate" form, which is required for sentence for some crimes by T.C.A. § 40-2707. That statute applies only to offense for which punishment must be set "within minimum and maximum terms." The punishment prescribed for conviction of first-degree murder, however, is not in this form, because there is no maximum term set by the Act. Therefore, T.C.A. § 40-2707 does not apply where a conviction is for first-degree murder.[10] When the jury announced that it had found the defendant guilty of first-degree murder, yet expressed its sentence in indeterminate form, the Trial Judge therefore had to send the jury back for reconsideration of the punishment. After reconsidering the matter, the jury returned its sentence in the correct form, and it was properly accepted by the Trial Court. This is no ground for Habeas Corpus relief; the practice, which has been approved

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[10] *Miller v. State*, 520 S.W.2d 729 (Tenn. 1975).

by the appellate courts of Tennessee,[11] is a reasonable method of meeting such a problem. The jury had reached a verdict on the guilt of the defendant, and there was no reason to think that that verdict would change just because the sentence would have to be changed; if the jury had felt that it would have said so at the announcement of the second sentence.

**Summary**

The petitioner has shown no deprivation of constitutional or statutory right which would entitle him to federal Habeas Corpus relief. The respondent respectfully suggests that the Record of the petitioner's trial is sufficient for the determination of all matters raised in this Petition, and that no evidentiary hearing will be required in this cause.

WHEREFORE, PREMISES CONSIDERED, THE RESPONDENT PRAYS THAT THIS ACTION BE DISMISSED.

Respectfully submitted,

/s/ TOM JENNINGS
Assistant Attorney General
414 Supreme Court Building
Nashville, Tennessee 37219
(615) 741-2250

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11 *Jenkins v. State*, 509 S.W.2d 240 (Tenn. Crim. App. 1974).



In the United States District Court
For the Western District of Tennessee
Western Division

James E. Mitchell, Petitioner,
v.
Jim Rose, Warden, Respondent. } Civil C-75-222

and

James Nichols, Jr., Petitioner,
v.
Jim Rose, Warden, Respondent. } Civil C-75-265

**ORDER OF REFERENCE TO MAGISTRATE**

(Filed August 6, 1975)

UPON CONSIDERATION, it is ORDERED that the captioned causes be referred to the Magistrate for a study, report and recommendation.

ENTER this 6th day of August, 1975.

/s/ BAILEY BROWN
CHIEF JUDGE

In the United States District Court for the
Western District of Tennessee
Western Division

| | | |
|---|---|---|
| James E. Mitchell, | Petitioner, | Civil Action C-75-222 |
| vs. | | |
| Jim Rose, Warden, | Respondent, | |
| and | | |
| James Nichols, Jr., | Petitioner, | Civil Action C-75-265 |
| vs. | | |
| Jim Rose, Warden. | | |

**REPORT ON REFERENCE**

(Filed Jan. 28, 1976)

The petitioners in this habeas corpus case were convicted of a double murder in the Circuit Court of Tipton County, Tennessee and each given two consecutively sixty-year terms in the penitentiary. They appealed their convictions to the Tennessee Court of Criminal Appeals, which affirmed. The Tennessee Supreme Court denied certiorari. The petitioners make the same claims here that they made in the Tennessee Court of Criminal Appeals. Most of these claims are not properly cognizable in a federal habeas corpus suit, but I will nevertheless discuss each one, at least briefly.

Prior to the trial the petitioner filed a plea in abatement which, among other things, asserted that



> [t]he array of the grand jury of Tipton County was not selected, drawn or summoned in accordance with the law and is not representative of the community from which it was impanelled because of systematic exclusion of Negroe's [sic], other minority's [sic] and people of lower income, expecially in regards to the position of the foremen of said grand jury. [Page 21 Technical Record.]

A hearing was held on this issue. Mr. Frank McBride, Sr. was called as a witness by the petitioners. (Beginning page 71, Vol. I.) Mr. McBride testified that, ten or twelve years ago, he served as foreman of the Tipton County Grand Jury for five or six years and "then about two or three times since then, just for one session of court." He testified that he had never known of a black acting as foreman of the grand jury. To his knowledge the presiding judge selected the grand jury foreman. He testified that it was his function as foreman to guide the proceedings and move them along.

Mr. Peyton J. Smith (whose testimony begins at page 74, Vol. I) testified that he served as foreman of the Tipton County Grand Jury for several years. He said that he was foreman for several years in the 1950's but had to resign for health reasons. He had, however, served several times since then when the regular foreman was ill. He did not know of any black ever having served as foreman. Mr. Smith served as foreman during the November, 1972 term, when the petitioners were indicted. He explained that he was chosen as foreman for the November, 1972 term in the following manner:

> Q. How were you chosen at the November term of Court? Who chose you to be foreman of the Grand Jury?
>
> A. The foreman who had been serving on a permanent basis at that time could not be here and I was asked to come and appear before this Court and the Judge asked me to serve.

Q. Who asked you to appear?

A. Mr. Naifeh, who was the foreman the Term before.

Q. You appeared before His Honor here?

A. Yes, sir.

Q. And His Honor commissioned you or appointed you as foreman of the Grand Jury for the November term?

A. Yes, sir.

Q. Was that in writing or was that just oral?

A. Oral. [Pg. 76, Vol. I.]

Mr. Smith testified that it was his practice while serving as foreman to question the witnesses first to get basic information to the attention of the members of the grand jury and then, after each witness has been examined, to ask other grand jurors if they wished to ask any further questions.

It is not entirely clear from the transcript whether Mr. Smith was chosen as a member of the grand jury panel and then asked to serve as foreman when the regular foreman became ill or whether he was simply appointed as foreman. This should be developed at an evidentiary hearing, as it is most important in light of the **Hale** case, which I shall discuss below.

Mr. Jimmy Naifeh testified (Pg. 81, *et seq.*, Vol. I) that he had been serving as foreman of the Tipton County Grand Jury for approximately two years and that he had never known there to be a black foreman.

Title 40, § 1506 of the Tennessee Code Annotated provides, in the following language, that the judge of the court having jurisdiction shall appoint foremen of grand juries:

> Judges having criminal jurisdiction in any county are authorized, and required to appoint the foremen of the grand juries in the counties of their respective jurisdiction; and said foremen shall hold office and exercise their powers



> for a term of two (2) years from appointment, unless for good cause, in the discretion of the presiding judge, he may be removed, relieved or excused from office at any time. Said foreman shall be the thirteenth member of each grand jury organized during his term of office, having equal power and authority in all matters coming before the grand jury with the other members thereof.

T.C.A. 40-1706 provides that an indictment cannot be found without the concurrence of "at least twelve grand jurors." Since the grand jury foreman, under 40-1506, sits as the thirteenth member of the grand jury, his vote can be the twelfth in returning an indictment. T.C.A. 40-1507 provides that every person appointed as a foreman of a grand jury shall be at least twenty-five years of age, be a good and lawful man and possess all the qualifications of a juror. The statutory duties of grand juries foremen are set out in T.C.A. 40-1510. They should assist and cooperate with the District Attorney and, out of term, advise the District Attorney with respect to all violations and provide him names of witnesses which he may summon before the grand jury in the next term. T.C.A. 40-1513 (supplement) provides that the grand jury foreman shall receive compensation in the amount of $10.00 per day for each day the grand jury of which he is foreman is actually in session.

The Tennessee statutory scheme for the selection of grand jury foremen is not typical. The typical statute provides for the appointment by the court of a grand jury foreman from the panel already chosen to serve as the grand jury. See for instance, Arizona Criminal Rule 90; Delaware Superior Court Criminal Rule 6(c); Florida Code 905.08; Idaho Code 19-1010; Illinois Code 78-16; Indiana Statutes 9-88; Kentucky Revised Statutes 5.04; New York Penal Code 190.20; Arkansas Statutes Annotated 43.903; Mississippi Code § 1780. Other states provide for the election of the foremen by the grand jury itself. See, for instance, Massachusetts General Law Annotated 277-677. But the Tennessee statute allows the judge to appoint

a foreman from the general population in addition to the regular grand jury of twelve.

The United States Supreme Court in *Whitus v. Georgia*, 385 U.S. 545 (1967), pointed out that:

> For over four-score years it has been federal statutory law, 18 Stat. 336 (1875) 18 U.S.C. 243, and the law of this court as applied to the states through the Equal Protection Clause of the Fourteenth Amendment, that a conviction cannot stand if it is based upon an indictment of a grand jury or the verdict of a petit jury from which Negroes were excluded by reason of their race. *Strauder West Virginia*, 100 U.S. 303 (1880); See also *Pierre v. State of Louisiana*, 306 U.S. 354, 59 S.Ct. 536, 83 L.Ed. 757 (1939).

The question of discrimination in the selection of a grand jury foreman has been previously raised in this court in the case of *Hale v. Henderson*, 336 F.Supp. 512, 349 F.Supp. 567, 400 F.2d 655, and 485 F.2d 266. In initially finding that the petitioner in *Hale* was entitled to an evidentiary hearing concerning the alleged exclusion of Negroes from the post of grand jury foremen, this court made the following observation:

> We do not understand why lack of systematic exclusion with respect to venires from which grand juries are drawn is an answer to petitioner's claim. As has been stated, grand jury foremen are appointed from the public at large, not from the venire; and even if they were appointed from the venire, it would still be possible systematically to exclude Negroes from appointment. If the court (state) means to say that, if the twelve members of the grand jury other than the foreman were selected without systematic exclusion of Negroes, it would be constitutionally immaterial if Negroes were systematically excluded from the position of foremen, we cannot agree. We cannot agree because *Whitus v. Georgia*, supra, does not indicate that a grand jury that is twelve-thirteenths constitutional can



> render constitutionally valid indictments. [336 F.Supp. 516].

An evidentiary hearing was held on this issue by Judge Mac Swinford, who heard the matter by special assignment. At the hearing it came out that the regular grand jury foreman who had been appointed pursuant to statute by the Cirminal Court Judge did not in fact serve as the foreman of the grand jury which indicted Mr. Hale. Therefore Judge Swinford concluded the following:

> Notwithstanding the petitioner's argument that grand jury foremen have been arbitrarily appointed and that over a period of history all grand jury foremen so appointed have been white, it appears that the particular grand jury indicting the petitioner was composed wholly of men selected from the venire. The grand jury indicting the petitioner was not chaired by the regular foreman, but by the foreman pro tempore, who was chosen from a body of grand jurors which was selected from the venire. There has been no evidence produced, nor has it been argued that the venire was discriminatorily constituted. The court must conclude that the venire was selected in a manner that did not systematically exclude blacks. [349 F.Supp. 568.]
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> • • • • • • • •
>
> Admittedly the court has left unanswered the question of whether a voting member of the grand jury may be selected by a process that does not protect against the systematic exclusion of racial groups. *Whitus* would seem to proscribe the deliberate exclusions of blacks from any voting position on the grand jury, but here it is clear that blacks were not systematically excluded from any of the thirteen voting positions of the grand jury that indicted the petitioner. [349 F.Supp. 569.]

The Sixth Circuit Court of Appeals affirmed Judge Swinford's holding. 485 F.2d 266.

It appears that the petitioners in the instant case have made out a *prima facie* case of systematic exclusion of Negroes from the post of grand jury foremen. See *Anderson v. Johnson*, 371 F.2d 84 (6th Cir. 1966); Note, 33 L.Ed. 2d 783; *Coleman v. Alabama*, 389 U.S. 22 (1967). No rebuttal evidence was submitted on the question. Indeed, it would have been awkward for any to have been tendered, since the Circuit Judge who appointed the foreman, whose acts were impliedly alleged to have been discriminatory, was presiding at the hearing on the motion.

I therefore recommend that the court hold an evidentiary hearing on the question of discrimination in the selection of a grand jury foreman.[1] The hearing can develop, among other things, whether Mr. Smith, who served as foreman on the grand jury that indicted the petitioners, was in fact selected from a venire which in turn had been chosen in a proper manner.

The petitioners also allege that there was discrimination in the selection of the jury venire.[2] There was a hearing in the trial court on this issue. (Page 54, *et seq.*) The evidence revealed that the jury panels were drawn by a child at random from a box which was kept sealed in the clerk's office. The names in the box were chosen by the jury commissioners going through a telephone directory and picking out people they knew, either personally or by reputation. The commissioners who testified said that they were aware of the need to include blacks on juries and that in fact blacks had served on both grand and petit juries in Tipton County. It was developed that the grand jury that indicted the petitioners contained one black, a lady named Mary Ann Buford. Ms. Buford testified (page 86, *et seq.*) that she served on the grand jury that indicted the petitioners

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[2] Mr. Mitchell states under Section twelve of his petition that there was racial discrimination in the selection of the "jury commissioners," but it is clear from subsequent statements that he is actually making the same complaint as Mr. Nichols, that is that the venire was improperly selected by the commissioners.



and that there was no discussion of the race of the petitioners and no hostility expressed toward them.

The evidence concerning the racial makeup of past juries of Tipton County, the method of selecting jurors, and the inclusion of blacks on juries is somewhat sketchy in the record we have. I would, therefore, recommend that the court permit the petitioners to develop additional evidence on this issue at an evidentiary hearing if they wish to do so in addition to pursuing their claim of discrimination in selecting the foreman.

The petitioners claim that there was no evidence to support the verdict of guilty against them and that the evidence preponderated against the verdict. This is not a claim properly made in a federal habeas corpus suit. Before federal habeas corpus relief could be granted there would have to be an almost complete lack of evidence. *Casias v. Patterson*, 398 F.2d 486, cert. den. 393 U.S. 1108. *Thompson v. City of Louisville*, 362 U.S. 199; *Martinez v. Patterson*, 371 F.2d 815. Anyway, there is an abundance of evidence to support the verdict. A host of eye witnesses unequivocally testified that it was the petitioners who committed the slayings they were charged with.

The petitioners challenge the legality of two searches which produced an incriminating 38 caliber pistol and sawed-off shotgun. On a tip from an informant, officers of the Memphis Police Department went to 661 St. Paul in Memphis on October 28, 1972 where they had been told the defendant Nichols was located. When they entered the apartment on St. Paul they found Mitchell and Nichols and a number of other people, all of whom they arrested. They knocked onn the door of the apartment and were admitted by someone other than the defendants. After entering the apartment one of the officers recognized the defendant Nichols, saw a gun in his hand and heard a noise as though some heavy object had hit the floor. (Page 177.) Later, a police officer asked the owner of the apartment, Antionette Gilchrist, for permission to search the apartment,

which she gave in writing. The .38 revolver was then found in a closet where a hot water heater was located. (Page 178.) In the home of Eddie Mae and Mildred Jones at 1054 North Claybrook a police officer later found a sawed-off 12-gauge shotgun, a box of cartridges and some blood clothing. (Pg. 182.) Before searching they obtained a written consent to search from Eddie Mae and Mildred Jones.

The petitioners do not claim any interest in the premises searched. Indeed, they were not even present when the search was made that produced the shotgun, cartridges and blood clothing. They therefore have no standing to challenge these searches even if they were illegal, which is doubtful in view of the consents. *United States v. Hearn and Taylor*, 496 F.2d 236 (6th Cir. 1974).

The petitioners were indicted for killing both Claudie Green and William A. Nabors. They were both tried on these two indictments at the same time. Their attorneys moved, prior to the trial, that they not be tried for both these murders at the same time. The court denied that request, and they claim here that that was error.

Both Claudie Greer and William A. Nabors were killed during the same robbery by, according to the evidence, these petitioners. Whether these charges were tried together or separately was a question of state law, within the discretion of the trial judge. This court cannot pass on purely state law issues unless they involve some violation of a federally protected constitutional right. *Roddy v. Black*, 516 F.2d 1380 (1975). Furthermore, it does not appear that the action of the trial judge in trying the two charges together was in any way amiss.

The petitioners were jointly indicted for the two murders on October 28, 1972. On November 16, 1972 the Circuit Judge entered an order appointing John Proctor and Wilbur Cash to jointly represent both the petitioners, James Nichols,



Jr. and James Mitchell. Counsel made a motion prior to the trial for the state to divulge any statements made against the interests of the defendants. The prosecuting attorney announced, however, with regard to confessions and statements, that "[t]he state has none, so we can just get that much of it out of the way at this time." (Pg. 6, Vol. I.) Later, the District Attorney announced that he had learned of a statement made by the petitioner, Mitchell, to officers of the Memphis Police Department. He moved that the names of the officers who took the statements be included on the list of witnesses on the indictment and offered to make a copy of the statement and a cassette recording of it available to defense counsel. (Pg. 98.) Counsel for petitioners made a motion for a severance, which was denied.

Later in the trial Lt. L. M. Rose of the Shelby County Sheriff's Office testified (beginning at page 303) that on November 2, 1972 the petitioner James Mitchell called him and Inspector Dan Jones to the security unit of the John Gaston Hospital to give a statement. Lt. Rose said that Mr. Mitchell was advised of his constitutional rights and then gave an incriminating statement about the incident he was being tried for and certain other offenses. The statement had been reduced to writing, but it was generally conceded (outside the presenc of the jury) that Mitchell's statement could not be read into the record without implicating Nichols. (Pg. 301.) Lt. Rose, therefore, gave a narrative summary of a statement that involved only Mitchell. He did not refer to Nichols and, in my opinion, did not give his narrative in such a way that it might, even inferentially, implicate Nichols. Among other things, he said that Mitchell said that he, Mitchell, went to his car at Sonny Man's, got his sawed-off shotgun, went back in the place and fired twice. On cross-examination, however, Mr. Cash asked the following questions which produced the following answers:

> Q. I believe you have stated that Mitchell told you that he had a sawed off shotgun?

A. Yes, sir.

Q. So, I'm not going to call any names in this, but, "What kind of gun did blank have?" "Blank had a shotgun." "What kind of shotgun?" "Sawed-off shotgun." "You don't know what gauge that was?" "Twelve gauge." Now, this is a statement that's supposed to have been made from that tape and you have it right here in the tape. I call your attention to this and ask you if this isn't some other name here, other than Mitchell's?

A. Mr. Cash, you're now involved in something else. You need to go deeper in that statement. [Pg. 306 *et seq.*]

The court then, at the request of the prosecuting attorney, gave an explanation to the jury of the legal reasons for not admitting the whole statement into evidence.

Although Lt. Rose's initial narrative did not implicate Nichols, the cross-examination by Mr. Cash did. Not only did it implicate Nichols it inferred that it was he who had, and used, the sawed-off shotgun, which the other evidence indicates was not the case. Counsel for Mitchell, of course, had a right and obligation to bring out any inconsistencies between the narrative given by Lt. Rose and the actual statement. There was no one to object to this on behalf of Mr. Nichols since both attorneys were representing both defendants.

There appears, therefore, to have been a violation of the rule laid down in *Bruton v. United States*, 391 U.S. 123 (1968). I recommend that the court include this issue in any evidentiary hearing. The court should also consider whether this error, in the context of the other evidence, would be harmless.[3]

Prior to the trial the petitioners filed a motion claiming that "serious doubts" had arisen "in the minds of petitioners as to

[3] This could only be Nichol's issue, although Mitchell also tries to raise it.



the mental stability of the defendants James Nichols, Jr. and James Mitchell." They alleged in their petition that they were then incapable of properly defending the charges against them due to their mental condition, and asked that they be admitted to some appropriate state institution for a period not exceeding thirty days for observation and a report to the court pursuant to Tennessee Code Annotated § 33-701. This motion was filed on March 16, 1973. (Page 44 Technical Record.) The motion was heard on March 19, 1973 (pg. 2 *et seq.*). The court conducted a full hearing, after which it denied the motion for psychiatric examinations, and by inference held that the petitioners were capable of assisting in their defense. The petitioners themselves testified at the hearing. From reading the transcript on this motion, I find nothing to indicate that the petitioners' constitutional rights were violated by the court's not granting a mental examination. Indeed, I find nothing to indicate that the judge erred in not granting such an examination.

The petitioners complain that they were denied their constitutional rights because the trial court refused to grant a continuance. It appeared as the trial started that two witnesses who had been subpoened, Chester Taylor and Leo Knox, were not present. After a hearing concerning what these witnesses would provide—allegedly an alibi—the court recessed the trial for a day and gave instructions to the Sheriff to make every effort to locate these witnesses. When the trial resumed Taylor and Knox were present, but the petitioners had decided they would not use them. Instead, they wanted some additional witnesses subpoened, whose names had allegedly been supplied them by Tay lor and Knox. After a hearing (pg. 15, *et seq.*) the court declined to further continue the trial. I do not believe he abused his discretion in doing so, and certainly did not deny any constitutional rights of the petitioners in doing so.

The petitioners complain of the court granting a severance for their co-defendant, Jesse E. Ford. The District Attorney

asked for a severance as to Mr. Ford, saying that he had intended to use him as a witness. The court granted the severance, although the prosecutor decided not to use Mr. Ford. It is not suggested in what manner the granting of a severance as to Jesse Ford might have infringed the petitioners' rights guaranteed by the United States Constitution. I do not believe that it did.

The jury returned with a verdict which was, under Tennessee Law, in an improper form. The following is what the Tennessee Code of Criminal Appeals said on this question:

> The tenth and eleventh assignments of error attack the verdict as returned by the jury. Upon returning from their deliberations, the jury announced that they had found plaintiffs-in-error guilty of murder in the first degree as charged in the indictments, and fixed their punishment "at not less than 30 years and 1 day and not more than 60 years for each count; Nos. 846 and 847". The trial court recognized that this verdict was in improper form, since the indeterminate sentence law does not apply to the capital offenses of murder and rape. *Franks v. State*, 187 Tenn. 174, 213 S.W. 2d 195.
>
> Plaintiffs-in-error maintain that the trial court should have declared a mistrial when the jury returned the above verdict, and should not have given them further instructions with examples as to what form the verdict should be. We cannot agree. As was said in *State ex rel. Myers v. Brown*, 209 Tenn. 141, 351 S.W.2d 385. "The Court has the power, and it is his duty, when a jury offers to return an informal or insufficient verdict, to send them back to the jury room with directions to amend it and put it in proper form". In light of the above, the trial court acted properly and the final two assignments of error are overruled.



This is an issue of state law which was not cognizable in a federal habeas corpus action.

I recommend that a Writ of Habeas Corpus Ad Prosequendum be issued to the United States Marshal for this district, the United States Marshal for the Middle District of Tennessee, and to the Warden of the Tennessee State Penitentiary to have the petitioners transported to the Shelby County Jail and lodged there pending the proceedings on their habeas corpus applications in this court. I further recommend that separate counsel be appointed for the defendants because of the *Bruton* question.

I further recommend that the court hold an evidentiary hearing on the jury and jury foreman selection issues and the *Bruton* question. I further recommend that the petitioners' application to this court be dismissed as to all other claims.

Submitted this, the 28th, day of January, 1976.

/s/ AARON BROWN, JR.
UNITED STATES MAGISTRATE

James E. Mitchell,
Petitioner,
v.
Jim Rose, Warden,
Respondent,
} Civil C-75-222

and

James Nichols, Jr.,
Petitioner,
v.
Jim Rose, Warden,
Respondent.
} Civil C-75-265

**ORDER FOR FURTHER RESPONSE**

This cause is again before this court following a reference to the magistrate who filed a report on January 28, 1976.

This court agrees with the magistrate that all claims of petitioners other than their claims having to do with racial discrimination in the selection of the grand jury, including the foreman of the grand jury, and the claim of petitioner Nichols based on *Bruton v. United States*, 391 U.S. 123 (1968), should be dismissed. It is so ORDERED.

The court disagrees with the magistrate to the extent that he recommends that a hearing be held with respect to racial discrimination in the constitution of the grand jury which indicted these petitioners. We are of the opinion, having studied the record made prior to the trial, that the question of racial discrimination in the selection of the grand jury was adequately investigated and that the state trial judge, in ruling that no discrimination had been shown in the selection of the grand jury, was the correct decision on the record before him.



We do, however, agree with the magistrate that, based upon the same inquiry, it would appear that a *prima facie* case has been made with respect to discrimination in the selection of the foreman of the grand jury. See *Hale v. Henderson*, 336 F.Supp. 512, 349 F.Supp. 567, 485 F.2d 266. The record does not indicate any evidence introduced to rebut such *prima facie* case.

We further agree with the magistrate that there appears to nave been a violation of the *Bruton*, supra, rule with respect to the petitioner Nichols in connection with the examination of the officer who testified concerning the statement made by petitioner Mitchell.

Accordingly, it is ORDERED that respondent further answer these petitions directed to the question concerning discrimination in selection of foremen of the grand jury and in connection with the claimed violation of the *Bruton* rule and, good cause appearing, twenty-three (23) days are allowed in which to answer.

ENTER this 17th day of February, 1976.

/s/ BAILEY BROWN
CHIEF JUDGE

In the United States District Court for the
Western District of Tennessee
Western Division

James Nichols, Jr.
vs.
Jim H. Rose, Warden.
} Civil No. C-75-265.

**FURTHER RESPONSE**

Now comes the respondent, by and through the Attorney General of Tennessee, and makes further response to the Order

of this Court to show cause why the Writ of Habeas Corpus and the relief prayed for in this cause should not be granted. In that regard, the most recent Order of this Court in this matter dismissed all claims by petitioner Nichols and petitioner Mitchell (C-75-222) except the claim of petitioner Nichols relative to a *Bruton* violation and the claims of both petitioners relative to the question concerning discrimination in the selection of foremen of the grand jury by which they were indicted. In this response, the respondent will address only the petitioner Nichols' claim relative to a *Bruton* violation. The claim of this petitioner and petitioner Mitchell regarding racial discrimination in the selection of the foremen of their grand jury will be addressed in a separate response.

I

As reflected by this Court's Order of February 17, 1976 and the Magistrate's reference report, there appears to have occurred a violation of the *Bruton* rule with respect to the petitioner Nichols. Apparently, any violation of the *Bruton* rule occurred during the cross-examination of Lt. Rose by the attorney representing both Mitchell and Nichols. Assuming arguendo, that the *Bruton* rule was violated during this cross-examination the respondent respectfully submits that such violation was clearly harmless error in view of the other evidence against petitioner Nichols and in light of the United States Supreme Court decision in *Brown v. United States*, 411 U.S. 223, 93 S.Ct. 1565 (1973).

II

In this regard, the respondent would respectfully show to this Court that an independent examination of the record as a whole would reveal that any *Bruton* error was harmless. The testimony erroneously admitted was merely cumulative of the other overwhelming and largely uncontroverted evidence properly before the jury. This other evidence included an eyewitness identification of the petitioner Nichols by more than one (1) witness. (See State Record, p. 66, 68, 70, 92, 94, 96).



III

In *Brown* the United States Supreme Court rejected the notion that a *Bruton* error can never be harmless. It should be noted in *Brown* the prosecution introduced on direct examination substantial portions of each defendant's confessions which implicated the other. In the instant case, any *Bruton* violation occurred on cross-examination and was not directly admitted through the State's direct proof. It should also be noted that, if a *Bruton* violation does exist, the instant violation is clearly less significant than the *Bruton* violation which was declared harmless error in *Brown*.

WHEREFORE, for the above-stated reasons, the respondent respectfully prays that the claim of petitioner Nichols with regard to an alleged *Bruton* violation be dismissed.

Respectfully submitted,

/s/ MICHAEL E. TERRY
MICHAEL E. TERRY
Assistant Attorney General
422 Supreme Court Building
Nashville, Tennessee 37219

**Certificate of Service**

I hereby certify that I have mailed a copy of the foregoing Response to Mr. James Nichols, Jr. No. 58054, Tennessee State Penitentiary, Nashville, Tennessee, this 11 day of March, 1976.

/s/ MICHAEL E. TERRY
MICHAEL E. TERRY
Assistant Attorney General

In the United States District Court for the
Western District of Tennessee
Western Division

James E. Mitchell,
Petitioner,
vs.
Jim Rose, Warden,
Respondent.
} Civil C-75-222

James Nichols, Jr.
Petitioner,
vs.
Jim Rose, Warden,
Respondent.
} Civil C-75-265

**FURTHER RESPONSE**

Now comes the respondent, by and through the Attorney General of Tennessee, and makes further response to the Order of this Court to Show Cause why the Writ of Habeas Corpus and the relief prayed for in this cause should not be granted. In that regard, the most recent Order of this Court in this matter dismissed all claims by petitioner Nichols and petitioner Mitchell except for the claim of petitioner Nichols relative to a *Bruton* violation and the claims of both petitioners relative to the question concerning racial discrimination in the selection of the foreman of the Grand Jury by which they were indicted. In a previously filed further response, the respondent addressed the petitioner Nichols' claim relative to a *Bruton* violation. Therefore, this Response addresses only the question concerning racial discrimination in the selection of the foreman of the Grand Jury by which both petitioners were indicted.



(1) As reflected by the Affidavit attached hereto, the State record previously filed, and the Magistrate's reference report, the following facts may be assumed concerning the foreman of the Grand Jury which indicted the petitioners and his method of selection:

(a) The foreman of the Grand Jury was Peyton J. Smith.

(b) Mr. Smith was not the regular foreman of the Tipton County Grand Jury but was selected by the trial judge to serve as foreman when the regular foreman, Mr. Naifeh, was unable to serve.

(c) The only reason for his selection as acting foreman, according to Mr. Smith, was his previous experience as foreman of the Tipton County Grand Jury.

(d) Mr. Smith did not vote to indict the petitioners since the indictment was returned on the vote of the other twelve (12) grand jurors.

(e) There is no evidence anywhere in the record of any irregularities in the selection of the other twelve (12) grand jurors.

(f) Mr. Smith's only role in the indictment of the petitioners was the simple and routine function performed by the foreman of a grand jury.

(g) Although twenty (20) or more witnesses were prepared to testify before the Grand Jury in this case, only one (1) witness testified and that witness was the police officer who had obtained confessions from the petitioners. The other twelve (12) grand juriors voted to indict the petitioners after hearing the testimony of this one (1) witness.

(2) The respondent has been unable at this point to ascertain whether Peyton J. Smith was a member of the regular Grand Jury venire when he was appointed to act as foreman. Inquiries

have been made to the trial judge and to the Clerk of Court in an attempt to ascertain whether Mr. Smith was a regular member of the Grand Jury venire or was simply selected based upon his past experience. The results of these inquiries will be forwarded to the Court as soon as the information is received. As this Court knows, if Mr. Smith was a member of the regular Grand Jury venire then petitioners' claims should be dismissed according to the authority of *Hale v. Henderson*, 336 F. Supp. 512, 349 F.Supp. 567, 400 F.2d 655, and 425 F.2d 266.

(3) The respondent further submits that the claims of petitioners should be dismissed based upon the facts now shown since the only role of Mr. Peyton J. Smith in the indictment returned against petitioners was to perform the supervisory functions of acting foreman. Mr. Smith did not vote for indictment and obviously the issue was never really in doubt since the twelve (12) regularly selected members voted for indictment after hearing only one (1) witness.

WHEREFORE, for the above-stated reasons, the respondent respectfully prays that the claims of the petitioners Nichols and Mitchell relative to the question concerning discrimination in the selection of the foreman of the Grand Jury by which they were indicted be dismissed.

Respectfully submitted,

/s/ MICHAEL E. TERRY
MICHAEL E. TERRY
Assistant Attorney General
422 Supreme Court Building
Nashville, Tennessee 37219

**Certificate of Service**

I hereby certify that I have mailed a copy of the foregoing Response to Mr. James E. Mitchell, No. 66684, Tennessee State Penitentiary, Nashville, Tennessee and Mr. James Nichols, Jr.,



No. 58054, Tennessee State Penitentiary, Nashville, Tennessee this 26 day of March, 1976.

/s/ MICHAEL E. TERRY
Assistant Attorney General

STATE OF TENNESSEE
COUNTY OF TIPTON

Being duly sworn, Peyton J. Smith states and makes oath that he was the acting foreman of the Tipton County Grand Jury which indicted James Nichols and James Mitchell for first-degree murder on November 6, 1972. Furthermore, the affiant states that to the best of his knowledge, belief, memory, and based upon a recent check of the records on file at the Tipton County Court house, the regular foreman of that Grand Jury, Mr. Naifeh, was unable to serve as foreman at the particular term which indicted the petitioners. At that term, the Judge appointed the affiant to serve as foreman since the affiant had previously served in that capacity some years prior. Furthermore, the affiant states that the only reason, to the best of his knowledge, for his selection as acting foreman was his prior experience as the foreman of previous grand juries. Furthermore, the affiant states that he is presently serving in the capacity of foreman of the Grand Jury of Tipton County. Furthermore, the affiant states that in all his years as foreman of the Grand Jury or acting foreman of the Grand Jury of Tipton County he has only once voted for indictment. In all other cases true bills have been returned based solely upon the vote of the other twelve (12) grand jurors. In this regard, the affiant states that he specifically remembers the case in which he voted for indictment and that case was not the case involving the petitioners Nichols and Mitchell. Finally, the affiant states that although some twenty (20) witnesses were called in the case involving the petitioners Nichols and Mitchell, the testimony of only one witness was heard, after

which all of the Grand Jurors indicated that they had heard sufficient testimony to establish probable cause and that they were ready to vote on the indictment.

/s/ PEYTON J. SMITH

Sworn and subscribed before me this 17th day of March, 1976.

In the United States District Court
For the Western District of Tennessee
Western Division

| | | |
|---|---|---|
| James E. Mitchell, Petitioner, v. Jim Rose, Warden, Respondent, | } | C-75-222 |
| and | | |
| James Nichols, Jr., Petitioner, v. Jim Rose, Warden, Respondent. | } | C-75-265 |

**ORDER**

(Filed April 6, 1976)

This cause is before the court again following the order of the court requiring a further response and the further responses filed pursuant thereto.



In the further response, respondent concedes that there was a violation of the *Bruton* rule with respect to petitioner Nichols but contends that, in view of the weight of the evidence against Nichols, the error was harmless.

It is therefore ORDERED that this matter be again referred to the Magistrate for a report and recommendation, after consideration of the State trial court record, as to whether such *Bruton* error was harmless with respect to petitioner Nichols.

As to the issue concerning discrimination against blacks in selection of the foremen of the grand jury, the further response contains an affidavit by the foreman who states in substance that he did not vote on the indictment of petitioners and that, although some twenty witnesses had been called, the twelve regular grand jurors voted to indict them after hearing the first witness testify. The further response states that counsel for respondent has not yet been able to determine whether this foreman was a regular member of the grand jury venire when he was appointed to act as foreman, that inquiries have been made in that regard, and that the response will be supplemented as soon as such information is received.

It is ORDERED that the further response be supplemented by affidavit as to whether the foreman was a regular member of the venire within ten days.

It is so ORDERED.

ENTER this 6 day of April, 1976.

/s/ BAILEY BROWN
CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

James E. Mitchell,
Petitioner,
vs.
Jim Rose, Warden,
Respondent.
} Civil C-75-222

James Nichols, Jr.,
Petitioner,
vs.
Jim Rose, Warden,
Respondent.
} Civil C-75-265

**FURTHER RESPONSE**

Now comes the respondent, by and through the Attorney General of Tennessee, and makes further response to the latest Order of this Court to Show Cause why the Writ of Habeas Corpus and the relief prayed for in this cause should not be granted. In that regard, the most recent Order of this Court in this matter ordered further response as to whether the Grand Jury Foreman was a regular member of the venire. In this regard, the respondent states as follows:

(1) The Foreman of the Grand Jury which indicted the petitioners was not a member of the regular venire.

(2) The Grand Jury which indicted the petitioners consisted of a black individual, Mary Ann Buford.

(3) In support of these facts the respondent herewith submits a letter from respondent's counsel to H. M. Patrick, Clerk of



the Circuit Court of Tipton County dated March 25, 1976; the response of H. M. Patrick dated April 1, 1976; and a certified copy of the minutes of the Circuit Court of Tipton County from November 6, 1972 which shows the composition of the Grand Jury and the Grand Jury venire.

(4) Inquiry has been directed to the trial judge in an effort to ascertain his considerations in selecting Peyton J. Smith as Foreman of this particular grand jury. That information will be provided the Court as soon as it is available.

(5) Based upon the information already before the Court, respondent concludes that the following facts have been shown:

(a) The Foreman of the Grand Jury was not a member of the Grand Jury Venire but was selected by the trial judge to serve as foreman when the regular foreman was unable to serve.

(b) The Foreman of the Grand Jury did not vote to indict the petitioners and the indictment was returned on the vote of the other twelve (12) grand jurors.

(c) Only one (1) witness actually testified and that was a police officer who obtained confessions from the petitioners. The other twelve (12) grand jurors voted to indict the petitioners after hearing the testimony of this one (1) witness.

(d) Among those grand jurors voting to indict the petitioners was a black lady, Mary Ann Buford.

(e) Ms. Buford has previously testified in state court that there was no indication of any racial prejudice or discrimination denoted in any way relative to the indictments of the two (2) petitioners. (See State Record, p. 90).

WHEREFORE, for the above stated reasons, the respondent respectfully submits that the indictments in this case were re-

turned without any hint of racial prejudice or discrimination in any form. For the sake of argument, it may be said that the system by which the Foreman of the Grand Jury in Tipton County in November of 1972 was selected was a system not completely immune from racial discrimination. Simply stated, it may have been possible to racially discriminate in the selection of a Grand Jury Foreman in Tipton County in November of 1972. However, to afford these petitioners any relief based upon a possibility which is not supported by any fact or reasonable inference would be to ignore the realities of this particular case. For these reasons, the respondent respectfully prays that the claim of the petitioners Nichols and Mitchell relative to the question concerning discrimination in the selection of the Foreman of the Grand Jury by which they were indicted be dismissed.

Respectfully submitted,

/s/ MICHAEL E. TERRY
Assistant Attorney General
422 Supreme Court Building
Nashville, Tennessee 37219

**Certificate of Service**

I hereby certify that I have mailed a copy of the foregoing Response to Mr. James E. Mitchell, No. 66684 and Mr. James Nichols, Jr., No. 58054, Tennessee State Penitentiary, Nashville, Tennessee, this 12 day of April, 1976.

/s/ MICHAEL E. TERRY
Assistant Attorney General



In the United States District Court for the
Western District of Tennessee

James E. Mitchell, Petitioner,
vs.
Jim Rose, Warden, Respondent. } Civil C-75-222

James Nichols, Jr., Petitioner,
vs.
Jim Rose, Warden, Respondent. } Civil C-75-265

**FURTHER RESPONSE**

Now comes the respondent, by and through the Attorney General of Tennessee, for the purpose of further responding to this Court's Order to show cause why the application for a Writ of Habeas Corpus should not be granted. In this regard, the respondent would respectfully show:

(1) As reflected by the attached affidavit of the trial judge, Herman L. Reviere, Mr. Peyton J. Smith was selected to serve as foreman of the Grand Jury which indicted the petitioners because he was willing and because he had experience and had shown his ability to do that job in the past. Apparently, Mr. Smith's race was not a consideration in his selection to serve as Foreman of this particular Grand Jury.

WHEREFORE, based upon all of the evidence before this Court, respondent respectfully prays that the application for a Writ of Habeas Corpus can be denied.

Respectfully submitted,

/s/ MICHAEL E. TERRY
Assistant Attorney General
422 Supreme Court Building
Nashville, Tennessee 37219

**Certificate of Service**

I hereby certify that I have mailed a copy of the foregoing Response to Mr. James E. Mitchell, No. 66684, and Mr. James Nichols, Jr., No. 58054, Tennessee State Penitentiary, Nashville, Tennessee, this 12 day of April, 1976.

/s/ MICHAEL E. TERRY
Assistant Attorney General

TO WHOM IT MAY CONCERN:

I, Herman L. Reviere, Judge of the Circuit Court of Tipton County, Tennessee, make the following statement under oath at the request of the Attorney General of the State of Tennessee.

I was the Circuit Court Judge for the Criminal Court of Tipton County, Tennessee at the November Term, 1972. Mr. Jimmy Naifeh was the regular foreman of the Grand Jury but was unable to serve because he was going to be out of the County at the November 1972 term. Mr. Peyton Smith had served for me as foremen on previous occasions due to the absence of the regular foreman and I asked him to serve at this time.



Also, Mr. Smith had served as regular Grand Jury Foreman for my predecessor in 1953 and 1954. Our records do not indicate that Mr. Smith was on the regular jury panel nor the grand jury panel in November 1972. We called Mr. Smith because he has been willing to act in the past and has experience and does a good job as such foreman.

In my five counties, I do not have a black grand jury foreman, although I have a black member of my Jury Commission in one county. Most all of my Grand Juries and Petit Juries have sizeable numbers of blacks on them, both men and women. I don't appoint Grand Jury Foreman very often because when their two year term expires, I usually reappoint them, thus they serve a long time and the problem doesn't come up very often. I don't think that I have really given any thought to appointing a black foreman but I have no feeling against doing so.

Witness my signature this April 5, 1976.

/s/ HERMAN L. REVIERE
Circuit Judge 16th Judicial Circuit

Sworn to and subscribed to before me this April 5, 1976.

/s/ H. M. PATRICK
Circuit Court Clerk

In the United States District Court for the
Western District of Tennessee
Western Division

James Nichols, Jr., Petitioner,

vs.

Jim Rose, Warden, Respondent.

No. C-75-265

**SECOND REPORT ON REFERENCE**

(Filed Feb. 15, 1976)

This cause, and that of petitioner's co-defendant, James E. Mitchell, were previously referred to me for a report and recommendation. In my prior report I recommended that the court further consider the charge that there was racial discrimination in selecting the foreman of the grand jury that indicted the petitioners, and I also recommended that the court further consider the violation by the state trial court of the rule set out in *Bruton v. United States*, 391 U.S. 123 (1968). Subsequent to that report the court disposed of the issues concerning alleged racial discrimination in selection of the grand jury and its foremen, and the State of Tennessee conceded that there was a violation of the *Bruton* rule as to James Nichols, Jr. The only question remaining is whether or not that violation was harmless error. The court again referred this matter to me for a report and recommendation on that issue.

After his arrest, the petitioner's co-defendant, James Mitchell, was in the security unit of the John Gaston Hospital in Memphis, Tennessee. Lt. L. M. Rose of the Shelby County Sheriff's office testified that Mitchell called him and Inspector Dan Jones



to the security unit of John Gaston to give a statement on November 2, 1972. Lt. Rose testified that Mitchell was advised of his constitutional rights, after which he gave an incriminating statement about the robbery and murder in Tipton County, Tennessee, which he and the petitioner were charged with. When the state undertook to introduce this confession into the joint trial of the petitioner and Mitchell, the court concluded that it could not be read into the record without implicating the petitioner. But Lt. Rose was allowed to give a narrative summary of the statement omitting any reference to the petitioner and implicating only Mitchell. As I stated in my previous report, it appears that Lt. Rose was successful in his effort to narrate Mitchell's statements in such a way as to not implicate or suggest the participation of Nichols in the incident about which the statement was given. Lt. Rose's narration of Mitchell's statement begins at page 304 of the trial transcript.

Mr. Mitchell told Lt. Rose that he, Mitchell, went to Sonny Man's Club in Tipton County on October 28, 1972 and gambled there. He later left that place and went to another establishment, but then came back. He first went inside, and then went back out to his car where he got a sawed-off shotgun. He went back into Sonny Man's and started shooting after he heard a shot. He said that he shot twice, and may have killed someone, but he did not know for sure.

After Lt. Rose testified about Mr. Mitchell's statement, Mr. Cash, who had been appointed along with Mr. Proctor to represent both defendants, questioned Lt. Rose about the statement that Mr. Mitchell had given. He asked Lt. Rose whether Mitchell told him that he, Mitchell, had a sawed-off shotgun. When Rose said that he did, Mr. Cash began reading from the statement, leaving out the name of Nichols. The following questions of Lt. Rose produced the following answers:

Q. I believe you have stated that Mitchell told you that he had a sawed-off shotgun?

A. Yes sir.

Q. So, I'm not going to call any names in this, but "What kind of gun did blank have?" "Blank had the sawed-off shotgun" "What kind of shotgun?" "Sawed-off shotgun." "You don't know what gauge that was?" "Twelve gauge."

Now, this is a statement that's supposed to have been made from that tape and you have it right here in the tape. I call your attention to this and ask you if this isn't some other name here, other than Mitchell's?

A. Mr. Cash, you're now involved in something else. You need to go deeper in that statement. [P. 306, *et seq.*]

The part of the statement that Mr. Cash read indicated that it was Nichols who had the sawed-off shotgun, although the last response of Lt. Rose indicated that Mr. Cash had taken part of the statement out of context.

The court, at the request of the prosecuting attorney, gave an explanation to the jury as to why the statement could not be admitted. The judge then asked Mr. Cash if he wanted to "clear that up with the officer." He appears to have been referring to the confusion about who had the shotgun. Mr. Cash said he had no further questions. It is this cross-examination by Mr. Cash of Lt. Rose that caused the *Bruton* violation.

For the court to hold that a violation of *Bruton* was harmless in the context of a particular case, the court must be able to find that it was harmless beyond a reasonable doubt. The quantity of other evidence of guilt, in addition to the illegally admitted statement, is of critical importance in deciding if a *Bruton* violation is harmless. *Harrington v. California*, 395 U.S. 250 (1969).

Sonny Man's Cafe (known on October 28, 1972 as White's Cafe), was a drinking and gambling establishment in Tipton County, Tennessee. The premises were divided into a front and back room, the front room being used primarily for eating



and drinking and the back room being used for gambling. On October 28, 1972 this establishment was robbed by two black males. During the robbery two patrons, Claudie Greer and William Nabors, were shot and killed. Greer was shot with a .38 caliber pistol and Nabors was shot in the face with a single-barrel sawed-off shotgun. After the robbery and killing, the two black males fled.

R. G. Knoblin, a Memphis police officer testified (beginning at page 164) that he received a tip from a reliable confidential informant on October 29, 1972, that the parties responsible for the murders in Tipton County were at a certain address on St. Paul Street in Memphis. Mr. Knoblin then called Deputy Sheriff Lavelle of Tipton County and received some information from him about the robbery and shooting at Sonny Man's Cafe the day before. Officer Knoblin, several other Memphis police officers and officers from Tipton County met at the address the informant had supplied. They knocked on the door to the apartment and were admitted. Everyone in the apartment, including Nichols and Mitchell, were arrested and brought to police headquarters.

Lt. Tom Marshall of the Memphis Police Department testified (beginning at page 175) that he investigated the Sonny Man's robbery and killing on Sunday, October 29, 1972. Detective Knoblin told him about the conversation with the confidential informant, and later Mr. Lavelle, with some witnesses from Tipton County, came to his office and looked at some mug-shots. As a result of viewing those mug-shots the Tipton County witnesses positively identified photographs of James Nichols. Mr. Marshall then went with the other officers to 661 St. Paul where Nichols and Mitchell, together with other residents, were arrested. Upon knocking on the door of the apartment at 661 St. Paul, the officers were admitted by a woman. While standing at the door looking in Mr. Marshall identified Mr. Nichols from the photograph that had previously been identified. As he started in the door he noticed a gun in Nichol's right hand.

As he entered the door Nichols stepped into a hall and apparently dropped the gun to the floor. Later, Antoinette Gilchrist told Mr. Marshall that the apartment was hers and gave the officers a consent to search. Lt. Marshall then found a .38 caliber revolver on the floor in the hall inside a closet. This was near where he saw Nichols drop a gun. The gun was fully loaded with six rounds of .38 caliber ammunition. Antoinette Gilchrist was wearing a ring which she gave to the officers. Upon searching the apartment, ten twelve-gauge shotgun shells were taken from a lady's purse lying on the couch. Later, the officers searched a resident at 785 Watkins upon consent of the residents, Eddie Mae Jones and her mother, Mildred Jones. From that search the officers found a sawed-off twelve-gauge shotgun, a box of cartridges and some bloody clothing.

Deputy Sheriff Charles Lavelle testified (beginning at page 34) that he investigated the robbery and murder at Sonny Man's on October 28, 1972. When he arrived he found William A. Nabors and Claudie Greer dead on the floor in the back room. Nabors had been shot in the face with a shotgun and Greer had been shot in the stomach with a bullet. The next day Mr. Lavelle took some witnesses to Memphis to confer with officers of the Memphis Police Department. Those witnesses were June Buford and John Paul Bonner.

Robert Reeder assisted Callie White in the operation of Sonny Man's Cafe on October 28, 1972. He positively identified James Nichols as one of the men who robbed them that morning. He testified that Nichols came into the place bandishing a .38 caliber pistol and another pistol and announced a "stickup." When he came in he hit one Ed Allen over the head, knocking him to the floor. He made others in the front room lie down on the floor and, when someone would come in, he would kick them down and shoot over their heads. During the affray, Mr. Reeder heard shots from the back room, and saw James Nichols fire into the back room with his pistol. After the robbers left, Claudie Greer was found dead of a pistol shot



in the back room. Mr. Reeder's testimony begins at page 59 of the transcript.

Callie White testified (beginning at page 87) that she was the owner of Sonny Man's Cafe in Tipton County at the time of the robbery. Around 3:00 o'clock or 3:30 a.m. on Saturday morning, October 28, 1972, James Nichols, whom she identified from the witness stand, came in the front door of her establishment and announced a holdup. He then hit Ed Allen on the head with a pistol and fired a shot toward the back room. Mrs. White heard two other shots from the back room and later saw Mitchell come out out of that room. Nichols got some money and a billfold from Robert Reeder and departed. She testified that there was absolutely no doubt in her mind that the person with the pistol was James Nichols because, for one thing, he kissed her. She was equally positive that it was James Mitchell who came from the back room with a sawed-off shotgun.

Ed Allen testified that he was a customer in Sonny Man's Cafe on the night of the robbery. He identified James Nichols as the man who came in and hit him in the head and robbed the place.

Sheppard Pitchford was in the back room of Sonny Man's on the night of the robbery. He identified James Mitchell as the man who robbed the back room and shot William Nabors in the face with a shotgun. He also testified that Claudie Greer was shot while standing in the back room with his hands up and that, prior to Greer falling, he heard a shot come from the front room. Mr. Pitchford briefly saw the other man with the pistol, but could not identify him. He identified the ring that was taken from Antoinette Gilchrist as his ring which had been taken from him by James Mitchell.

Antoinette Gilchrist testified (beginning at page 188) that James Nichols and James Mitchell were at her house when the police officers arrived. She testified that she consented to the

search of her apartment and that the officers found a .38 caliber pistol, which James Nichols had brought with him. She also identified the ring belonging to Sheppard Pitchford as being a ring she obtained from James Nichols shortly before the officers arrived.

Paul Bonner testified (beginning at page 219) that he was in the front room of Sonny Man's on the night of the robbery. He identified James Nichols as the man who came into the place, hit Ed Allen over the head, robbed the establishment, and fired toward the back room.

June Buford (a male whose real name is "Van") was in Sonny Man's on the night of the robbery. He was in the front room when James Nichols, who he identified, came in, hit Ed Allen and robbed the place. Nichols had a pistol which he fired once or twice, but Mr. Buford did not know in which direction.

Dewitt Driver was in the back room of Sonny Man's when the robbery occurred. He testified (beginning at page 262) that James Mitchell came in and fired a shotgun at the ceiling and announced a holdup. Later, a pistol shot felled Claudie Greer. Then James Mitchell shot William Nabors with the shotgun.

Willie Owens was in the back room at the time of the robbery, and identified Jmes Mitchell as the individual with the shotgun who shot William Nabors. He testified that Claudie Greer was shot before Nabors was.

It is true that the testimony of Lt. Rose concerning Mitchell's statement indicated that Mitchell said Nichols, raher than he, had the shotgun. However, Lt. Rose's last statement indicated that there was some confusion about the matter or that the part of the statement Mr. Cash was reading had been taken out of context. All of the other evidence clearly establishes that it was Mitchell who had the shotgun and Nichols who had



the pistol. I do not see how this particular confusion could have significantly damaged Nichols's defense. If anything, the confusion would likely have inured to his benefit in view of all the other unmistakable identification of him as the individual with the pistol. The evidence against Nichols was truly overwhelming. I find, therefore, that the *Bruton* violation was harmless beyond a reasonable doubt.

Submitted this the 15th day of February, 1977.

/s/ AARON BROWN, JR.,
United States Magistrate

In the United States District Court
For the Western District of Tennessee
Western Division

James E. Mitchell,
Petitioner
v.
Jim Rose, Warden,
Respondent,
} Civil C-75-222

and

James Nichols, Jr.,
Petitioner,
v.
Jim Rose, Warden,
Respondent.
} Civil C-75-265

**MEMORANDUM AND ORDER**

(Filed Feb. 17, 1977)

This cause is before the court following a further reference to the magistrate and receipt of a second report on reference

from the magistrate. The reference was for the single purpose of determining whether or not the violation of the *Bruton* rule with respect to petitioner Nichols was harmless beyond a reasonable doubt. The magistrate, after reviewing the evidence, concluded that the violation of the *Bruton* rule was harmless beyond such doubt.

This court, after consideration, is likewise of the opinion that the violation of the *Bruton* rule, considering the content of the violation of the rule, and considering the massive other evidence against this petitioner, was harmless beyond a reasonable doubt.

With respect to both petitioners, Mitchell and Nichols, the court is further of the opinion from the record that no racial discrimination in the composition of the grand jury has been shown. On the contrary, it appears that one black person actually served on the grand jury that indicted these petitioners, that the foreman was selected for other than racial reasons, and that the foreman did not vote at the time the indictment was rendered.

The Clerk will therefore enter a final judgment dismissing these actions. It is so ORDERED.

ENTER this 17 day of February, 1977.

/s/ BAILEY BROWN
CHIEF JUDGE



United States District Court
for the
Western District of Tennessee
Western Division

Civil Action File No. C-75-265

James Nichols, Jr.
v.
Jim Rose, Warden

**JUDGMENT**
(Filed February 18, 1977)

This action came on for consideration before the Court, Honorable Bailey Brown, United States District Judge, presiding, and the issues having been duly * * * considered and a decision having been duly rendered, in favor of the defendant,

It is Ordered and Adjudged that this action be and is hereby dismissed.

Dated at Memphis, Tennessee, this 18th day of February, 1977.

/s/ John W. (Illegible)
Deputy Clerk of Court

United States District Court
Western District of Tennessee
Western Division

Civil Action File No. C-75-222

James E. Mitchell
vs.
Jim Rose, Warden

**JUDGMENT**
(Filed February 18, 1977)

This action came on for consideration before the Court, Honorable Bailey Brown, United States District Judge, presid-

ing, and the issues having been duly * * * considered and a decision having been duly rendered, in favor of the defendant,

It is Ordered and Adjudged that this action be and is hereby dismissed.

Dated at Memphis, Tennessee, this 18th day of February, 1977.

/s/ John W. (Illegible)
Deputy Clerk of Court

In the United States District Court
For the Western District of Tennessee
Western Division

| | | |
|---|---|---|
| James E. Mitchell, | Petitioner, | Civil C-75-222 |
| v. | | |
| Jim Rose Warden, | Respondent, | |
| and | | |
| James Nichols, Jr., | Petitioner, | Civil C-75-265 |
| v. | | |
| Jim Rose, Warden, | Respondent. | |

**ORDER DENYING MOTION FOR HEARING, ETC.**

(Filed March 23, 1977)

Following our memorandum and order of February 17, 1977, in which we directed that a final judgment be entered for the



respondent, an earnest motion for hearing and/or amendment of judgment and/or reconsideration has been filed in behalf of petitioners by the University of Tennessee Legal Clinic. In this motion, supported by memorandum, it is contended that petitioners have made a prima facie case with respect to discrimination in the selection of the trial jury and, further, that petitioners have made a case of discrimination in the selection of the grand jury foreman.

With respect to the first contention, that is, the contention having to do with discrimination in the selection of the trial jury, it appears to the court that the instant motion raises this issue for the first time, and, as we read the assignments of error in the direct appeal of these convictions, there was no contention that such discrimination occurred with respect to the selection of the trial jury. Since the assignments of error in the direct appeal are the only basis for a showing of exhaustion of state remedies here, it is the opinion of the court that petitioners have not exhausted state remedies insofar as they contend that there was racial discrimination in the selection of the trial jury.

With respect to the other contention in the instant motion having to do with selection of the foreman of the grand jury, this court entered an order on February 17, 1976 dismissing the contention on the ground that this issue had been adequately investigated by the state trial judge and that his determination that there had been no racial discrimination was correct. Since this court made the determination that this contention should be dismissed, our determination is further supported by the decision of the Supreme Court of the United States in *Stone v. Powell*, —U.S.—, 49 L.Ed. 2d 1067 (1976). As we read that decision, where the claim of constitutional error does not go to the integrity of the fact-finding process so far as the conviction is concerned, if petitioner received a full and fair hearing in state court as to his claim, the federal court will not review the determination by the state court. Thus, not only have we found the decision in state court to be correct, but also it ap-

pears that, since the contention was fairly heard in state court, petitioners are not entitled to another review here. See also: *O'Berry v. Wainright*, —F.2d—, 45 L.W. 2422 (decided Feb. 11, 1977).

Accordingly, the instant motion will be denied.

It is so ORDERED.

ENTER this 23rd day of March, 1977.

/s/ BAILEY BROWN
CHIEF JUDGE

In the United States District Court for the
Western District of Tennessee
Western Division

James E. Mitchell
vs.
Jim Rose, Warden } C-75-222

and

James Nichols, Jr.
vs.
Jim Rose, Warden } C-75-265

**CERTIFICATE OF PROBABLE CAUSE AND ORDER ALLOWING APPEAL ON PAUPER'S OATH**

(Filed April 1, 1977)

The petitioners having been allowed to proceed originally in this Court *in forma pauperis* and this Court finding no reason to certify that the appeal is not taken in good faith;



On application of the petitioners through counsel, this Court hereby grants the motion to proceed *in forma pauperis* and issues a Certificate of Probable Cause pursuant to Rule 22 (b) of the Rules of Appellate Procedure.

/s/ BAILEY BROWN
CHIEF JUDGE

**OPINION**

No. 77-1272

**UNITED STATES COURT OF APPEALS**
**For the Sixth Circuit**

JAMES E. MITCHELL and JAMES NICHOLS, JR.,
*Petitioners-Appellants,*
v.
JIM ROSE, WARDEN,
*Respondent-Appellee.*
} Appeal from the United States District Court for the Western District of Tennessee.

Decided and Filed January 9, 1978

Before: PHILLIPS, Chief Judge, PECK, Circuit Judge, and GRAY, Senior District Judge.*

PECK, Circuit Judge. On November 6, 1972, Petitioners James Mitchell and James Nichols, Jr., were indicted for two counts of first degree murder by the Tipton County, Tennessee grand jury. On March 22, 1973, they were found guilty after a jury trial.

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* Honorable Frank Gray, Jr., United States District Court for the Middle District of Tennessee, sitting by designation.

Prior to the trial, petitioners filed a pro se motion, asking the trial court to dismiss the indictment because the grand jury and the foreman of the grand jury which indicted them had been selected in a racially discriminatory manner. A pretrial hearing was held and the trial judgment, making no written or oral findings of fact or rulings of law, entered an order which stated in full: "Plea in abatement is overruled."

The ruling was upheld in the Tennessee Court of Criminal Appeals on the grounds that racial discrimination had not been proved, and certiorari to the Tennessee Supreme Court was denied. Petitioners then turned to the federal courts for relief, filing pro se petitions for writs of habeas corpus in the United States District Court for the Western District of Tennessee.

The district judge denied an evidentiary hearing, and ruled that

> the question of racial discrimination in the selection of the grand jury was adequately investigated and that the state trial judge, in ruling that no discrimination had been shown in the selection of the grand jury made the correct decision on the record before him.

The district judge went on to hold, however, that a prima facie case had been made with respect to the foreman issue, and ordered the state to make further response.

The state submitted two affidavits. The foreman of the grand jury which indicted the petitioners stated that he had not voted on the indictments, and that petitioners were indicted after the grand jury had heard only one witness. The judge who had appointed the foreman also submitted an affidavit, stating, "We called Mr. Smith [the foreman] because he has been willing to act in the past and has experience and does a good job as such foreman." The trial judge's affidavit continued:



> In my five counties, I do not have a black grand jury foreman, although I have a black member of my Jury Commission in one county. Most all of my Grand Juries and Petit Juries have sizeable numbers of blacks on them, both men and women. I don't appoint Grand Jury Foremen very often because when their two year term expires, I usually reappoint them, thus they serve a long time and the problem doesn't come up very often. I don't think that I have really given any thought to appointing a black foreman but I have no feeling against doing so.

On the basis of these affidavits, the district court ordered the dismissal of the petitions for habeas corpus relief, stating:

> [N]o racial discrimination in the composition of the grand jury has been shown. On the contrary, it appears that one black person actually served on the grand jury that indicted these petitioners, that the foreman was selected for other than racial reasons, and that the foreman did not vote at the time the indictment was rendered.

The petitioners have appealed that order, contending that they have made out a prima facie case of discrimination in the selection both of the grand jury and of the foreman, which the State of Tennessee has not adequately rebutted. In the alternative, they argue that they have a right to an evidentiary hearing in the district court to further develop the facts.

## I

Tennessee uses the "key man" system of jury selection, relying on three jury commissioners appointed by the trial judge to select a pool of prospective grand jurors from the general population. Tenn. Code. Ann. § 22-223. Every two years, the commissioners meet to select names "from the tax records and permanent

registration records of the county, or other available and reliable sources," § 22-228. The number of names are determined by the judge. The names are recorded officially in a jury list book, § 22-228(a), then written on cards, sealed in a box, and drawn at random as needed for jury service. The same list serves as jury pool for both grand and petit juries.

The commissioners have a duty to propose a "list of names of upright and intelligent persons known for their integrity, fair character and sound judgment." § 22-228. The basic statutory qualifications for jury service are that a juror must be at least eighteen years old, a United States citizen and a resident of the county in which he or she serves as juror. § 22-201. In addition, persons convicted of "infamous offenses," of unsound mind, with deficient sight or hearing, or habitually drunk are disqualified. Persons in certain exempt occupations or who would suffer hardship if they served are excused.

The foreman or forewoman of the grand jury is selected in an entirely different manner. In essence, they are hand-picked by the trial judge from the eligible population for a two-year appointment. § 40-1506. They are subject to the same statutory qualifications as jurors except that they must be at least twenty-five years old.

## II

The facts elicited at the pretrial hearing were meager, especially as to hard figures or even substantiated estimates of the racial makeup of Tipton County grand juries. For instance, there is no indication in the record of the total number of persons in the jury pool, nor is there any indication of the racial makeup of the pool. However, some relevant information may be gleaned from the record.

In 1972, the jury commissioners in Tipton County were three men, all white. The November, 1972 grand jury was



selected from the jury pool chosen two years earlier. Names were selected from the local telephone directory,[1] and all three commissioners testified that they selected names only of persons they knew, either personally or by reputation, and that they were aware of their duty to select, without prejudice, black members of the community.

Very few statistics were mentioned at the hearing, although one commissioner testified that he though the county was about 30% black. (The 1970 Census shows that Tipton County was 32.4% black.)[2] Neither the total number of names in the jury pool, nor the number of blacks was established, though it is significant that the state could easily have done so. This would prove beyond a doubt that there was no discrimination, if such were true, since a jury list book is a statutory requirement, and since the commissioners are ac-

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[1] Petitioners have challenged the use of the telephone directory as a source of names for jury service. The use of phone books has been upheld in the past, *Gebhard v. United States*, 422 F.2d 281 (9th Cir. 1970), but petitioners, relying on census data, have made a showing that 44.3 percent of Tipton County black households are without telephone service while only 20.7 percent of white households are without such service. The use of voting lists with such disparities has been upheld, but on the grounds that registering to vote is a voluntary act which is reasonable to require of jurors. We need not decide whether obtaining telephone service is a similar voluntary act, but note that the Supreme Court, reversing a district court's finding of no discrimination, has held that

> the court should not have passed without response the commissioners' elimination from consideration for jury service of about 9% of the population of the entire county. In the face of the commissioners' unfamiliarity with Negroes in the community and the informality of the arrangement by which they sought to remedy the deficiency in their knowledge upon recompiling the jury list, we cannot assume that inquiry would not have led to the discovery of many qualified Negroes.

*Turner v. Fouche*, 396 U.S. 346, 360 (1970).

[2] The courts may take judicial notice of census figures, absent a showing that they are unreliable for some reason. *Goins v. Allgood*, 391 F.2d 692 (5th Cir. 1968); *cf., Castaneda v. Partida*, 430 U.S. 482, 487-488 (1977).

quainted with everyone on the list. However, three prior foreman did testify in vague terms about the representation of blacks on the juries themselves.

The three of them had served off and on as grand jury foreman since the early 1950's. None of them could recall a black foreman or forewoman. However, each testified that blacks had served on their grand juries, remembering "several," "some," "probably three or four," "usually two or three," and one black woman on the November, 1972 grand jury that indicted the petitioners.[3]

## III

The fundamental rules to be applied in cases charging grand jury discrimination are well established. For almost a century it has been settled law that if a state chooses to use grand juries to return indictments, the jurors must be selected without discrimination because of race or color. In 1879, in its landmark trilogy of cases establishing the right of blacks to serve on juries and grand juries, and the right of every accused citizen to an indictment by a grand jury selected without discrimination, the Supreme Court pointed out:

> It is not easy to comprehend how it can be said that while every white man is entitled to a trial by a jury . . . selected without discrimination against his color, and a negro is not, the latter is equally protected by the law with the former. Is not protection of life and liberty against race or color prejudice a right, a legal right, under the constitutional amendment? And how can it be maintained that compelling a colored man to submit to a trial for his life by a jury drawn from a panel from which

[3] The state presented no rebuttal except the testimony of the Circuit Court Clerk, who agreed with the prosecutor's comment that there had been "a very substantial number of members of the Negro race" on petit and grand juries.



> the State has expressly excluded every man of his race, because of color alone, however well qualified in other respects, is not a denial to him of equal legal protection?

*Strauder v. West Virginia*, 100 U.S. 303, 309 (1879). Substantial underrepresentation, as a result of purposeful discrimination, is as much a constitutional violation as total exclusion. *Castaneda v. Partida*, 430 U.S. 482 (1977); *Turner v. Fouche*, 396 U.S. 346 (1970).

There seems to be a common misconception, exemplified by the trial judge's comments at the evidentiary hearing, the district court's opinion dismissing the petition, and respondent's brief, that constitutional requirements are met if there are simply "some" blacks on grand juries. This is probably due to frequent judicial statements that there is no requirement for any particular jury panel to contain blacks, and that the venire need not contain the names of blacks in the same proportion as they are to be found in the general population. Both these statements are quite true; however, they are true because both may occur without discrimination against blacks. However large a percentage of the jury pool are black, and single jury, randomly drawn, may be all white (or, for that matter, all black). Also, neutral legitimate requirements imposed by the state on its jurors may weigh more heavily on one race than another, resulting in percentages different from those in the general population. Whether the presence of a few blacks on grand juries over the years is evidence tending to prove or disprove racial discrimination depends on the proportions of blacks who are qualified for jury service.

The method of establishing a prima facie case of intentional discrimination is also well-established when, as here, the alleged discrimination is aimed at blacks. If over a significant period of time there exists a substantial disparity between the proportion of blacks in the general population, and the pro-

portion called to serve as grand jurors,[4] and the selection procedure affords an opportunity to discriminate or is not racially neutral,[5] then the defendant has made out a prima facie case, and the burden shifts to the state to rebut the case. *Castaneda, supra,* 430 U.S. 482; *Alexander v. Louisiana,* 405 U.S. 625 (1972).

Once the burden has shifted to the state, it may rebut the prima facie case in several ways. The state may impose any reasonable qualifications it wishes on its grand jurors; for instance, it may require that they be literate, that they not be convicted felons, or that they be registered voters. The neutral imposition of any of these requirements may *possibly* result in the exclusion of more members of one race than another. "There are many possible circumstances which, if they exist here, might account lawfully for the observed disparity. The

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[4] In most reported cases thus far, this statistical analysis has been largely intuitive, based on rough impressions about probabilities. However, given accurate data, the probability that racial results are due to chance can be analyzed mathematically and either affirmed or rebutted with considerable accuracy. For instance, in *Castaneda, supra,* 430 U.S. 482, with a 79.1% Mexican-American population and 39% Mexican-American grand jurors over a period of eleven years, the Supreme Court could determine that the chances of such a result occurring without racial discrimination were less than one in ten to the 140th power, and thus could be described as impossible. *See* Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases,* 80 Harv. L. Rev. 388 (1966). Statisticians generally reject the possibility that a particular result is due to chance when the probability of that result occurring by chance is less than one in twenty. *Id.* at 359. We need not decide today at what point the courts should similarly reject an assertion that a particular racial result is due to chance rather than discrimination.

[5] While the facial constitutionality of the key-man system has been upheld, it has been frequently recognized as a method particularly subject to abuse, and therefore subject to close scrutiny by the courts. We note, as has the Supreme Court on numerous occasions, that random selection methods similar to the federal system would avoid most of the potential for abuse found in the key man system, and would probably eliminate challenges such as the State of Tennessee faces here. *Castaneda, supra,* 430 U.S. at 497 n. 18.



suggestion of their possible existence is not enough, however." *Stephens v. Cox,* 449 F.2d 657 (4th Cir. 1971). The state must present some concrete evidence of the effect of its neutral requirements, not merely present to the court unfounded suppositions about the literacy, intelligence and good character of its black citizens.[6] Finally, it should be noted that self-serving protestations from the officials involved that racial considerations played no part in the selection are not enough to rebut a prima facie case. *Castaneda, supra,* 430 U.S. at 498 n. 19; *Alexander v. Louisiana, supra,* 405 U.S. at 632.

## IV

Applying these principles to the grand jury selection in this case is difficult because of the vague nature of the data available. Accepting as true the testimony of the grand jury foremen at the pretrial hearing, over the last quarter-century there has been at least one grand jury which was less than 8 percent (one in thirteen) and one which was nearly 31 percent black (four in thirteen). These figures do not help us, however, because there is no way to tell from the record what average percentage of all the grand juries over those years was black, the only statistic which would help to prove or disprove the existence of discrimination.

We need neither depend on questionable estimates nor remand for a time-consuming hearing,[7] however, because there is no guesswork about the figures in the second aspect of petitioners' case. There has never been a black foreman or fore-

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[6] *See Turner v. Fouche,* 396 U.S. 346 (1970), in which the Supreme Court rejected the state's attempt to explain the disparity in black representation on juries by arguing, without substantiation, that many blacks were not "upright" or "intelligent" enough to serve.

[7] In *Townsend v. Sain,* 372 U.S. 293 (1963), the Supreme Court held that an evidentiary hearing must be held on an application for federal habeas corpus relief "unless the state-court trier of facts has after a full hearing reliably found the relevant facts." *Id.* at 313.

woman of a grand jury in Tipton County according to the recollections of the trial judge, three jury commissioners, and three former foremen. The statutory qualifications are identical to those of jurors except that foremen or forewomen must be a few years older. The position is filled by the trial judge from the general population, thus affording ample opportunity for discrimination, whether conscious or unconscious. While discrimination must be "intended," officials who select grand jurors must be considered to have intended the natural results which flow from their conduct. *Rabinowitz v. United States*, 366 F.2d 34 (5th Cir. 1966). Thus a judge who "never really gave any thought" to appointing a black is discriminating just as surely as were the jury commissioners who never selected blacks because their names were "never discussed." *Norris v. Alabama*, 294 U.S. 587 (1935), or because they didn't know any blacks, *Turner v. Fouche*, 396 U.S. 346 (1970). Officials who select grand jurors have a duty to learn who is qualified to fill the position of grand juror, and to consider qualified individuals from all segments of society. Failure to perform that duty, resulting in the exclusion of a qualified segment of society, is unconstitutional discrimination. *Turner, supra*, 396 U.S. 346.

Thus the petitioners clearly established a prima facie case of racial discrimination in the appointment of grand jury foremen and forewomen. The state presented no rebuttal to this case at the hearing, but in response to the district court's request for a further answer to this prima facie case, submitted the two affidavits described above. In dismissing the petitions, the district judge stated that the foreman was "selected for other than racial reasons, and . . . did not vote at the time the indictment was rendered." Thus we must decide whether, as the district court ruled, the state has successfully rebutted the prima facie case.

Perhaps understandably, it appears that the district court has given undue weight to the exculpatory affidavit of the trial



judge. In *Alexander v. Louisiana, supra*, 405 U.S. 625, the Supreme Court pointed out that

> the clerk of the court, who was also a member of the jury commission, testified that no consideration was given to race during the selection procedure. App. 34. The Court has squarely held, however, that affirmations of good faith in making individual selections are insufficient to dispel a prima facie case of systematic exclusion. *Turner v. Fouche, supra*, at 361; *Jones v. Georgia*, 389 U.S. 404, 407 (1967). "The result bespeaks discrimination, whether or not it was a conscious decision on the part of any individual jury commissioner." *Hernandez v. Texas*, 347 U.S., at 482. . . . The commissioners, in any event, had a duty "not to pursue a course of conduct in the administration of their office, which would operate to discriminate in the selection of jurors on racial grounds." *Hill v. Texas*, 316 U.S. 400, 404 (1942).

An absence of blacks qualified to serve as foremen or forewomen has not been demonstrated or even suggested; thus there has been no rebuttal of petitioners' prima facie case.

The fact that the foreman did not vote on petitioners' indictments also fails to support the district court's dismissal. Consideration of this factor is closly linked to the final, implicit question in this appeal: whether proof of discrimination in the selection of a grand jury foreman mandates the same remedy as does proof of discrimination in the selection of the grand jury. Normally, if the state fails to successfully rebut a prima facie case of discrimination, a writ of habeas corpus must issue, since the indictment and all proceedings on that indictment are void. *See Castaneda*, 430 U.S. 482. There is no need for the petitioner to show prejudice, and a showing of no prejudice by the state is no defense. *Hill v. Texas*, 316 U.S. 400 (1942).

The question is whether the same result is required when there is discrimination shown only in the selection of the grand jury foreman. While the parties did not brief this issue, it is necessary that we consider it since the district court apparently relied on a finding of no prejudice, pointing out that the foreman rendered no vote on the indictment.

In 1973, this Court held on facts similar to those here that no discrimination had been proved because the particular foreman in question had not been appointed in the usual fashion, but selected in an emergency from among the grand jurors. There was no challenge to the makeup of the grand jury panel. Thus the defendant could not rely on proof of past absence of blacks from the foreman position, along with a selection process susceptible to abuse, because the foreman in this case had not been selected in the same manner. *Hale v. Henderson*, 485 F.2d 266 (6th Cir. 1973), *cert. denied*, 415 U.S. 930 (1974). Not inconsistent with that opinion, we hold today that where a prima facie case of discrimination in the selection of grand jury foreman has been established, and has not been rebutted, "the conviction cannot stand, because the Constitution prohibits the procedure by which it was obtained." *Hill v. Texas*, supra, 316 U.S. at 406.

The foreman or forewoman is vitally important to the functioning of grand juries in Tennessee, being "the thirteenth member of each grand jury organized during his term of office, having equal power and authority in all matters coming before the grand jury with the other members thereof." Tenn. Code Ann. § 40-1506. He or she is expected to assist the district attorney in investigating crime, may administer oaths to all witnesses, conduct the questioning of witnesses, must indorse and sign all indictments,[8] and like every other

[8] *See* Tenn. Code Ann.,

§ 40-1510. Duties of foremen or forewomen.—It shall be the duty of such foremen or forewomen of grand juries to assist and cooperate with the district attorney in ferreting out crime, to the end that the laws may be faithfully enforced; and such foremen or forewomen are directed out of term to advise the district attorney with respect to law violations and furnish him names of witnesses, whom the district attorney may, if he deem proper, order summoned to go before the grand jury at the next term. In term time, the foreman or forewoman may order the issuance of subpoenas for witnesses to go before the grand jury, unless otherwise ordered by the district attorney.

§ 40-1622. Power of foreman to administer oath.—The foreman of the grand jury shall have power to administer oaths to all witnesses brought before the grand jury to testify as to the violations of the criminal laws in all cases where the clerks of the criminal and circuit courts may administer said oath.

§ 40-1706. Concurrence in true bill.—An indictment cannot be found without the concurrence of at least twelve (12) grand jurors, and, when so found, shall be indorsed "A true bill" and the indorsement signed by the foreman.

§ 40-1709. Presentation of indictment.—An indictment, when found by the grand jury, and indorsed as prescribed by this chapter, shall be presented by the foreman, in their presence, to the court, and filed by the clerk.



chairperson is in a position to guide, whether properly or improperly, the decision making process of the body. Additionally, the indorsement and signature of the foreman or forewoman is indispensible to an indictment in Tennessee, and their absence voids the bill. *Bird v. State*, 103 Tenn. 343, 52 S.W. 1076 (1876).

In any case, even without these important duties and powers, the foreman or forewoman is a full member of the grand jury, and we agree with the district court in *Hale v. Henderson*, 336 F.Supp. 512 (W.D. Tenn. 1972), that a grand jury which is only twelve-thirteenths constitutional cannot render constitutionally valid indictments.

It seems clear that the potential for prejudice, given the position of authority and influence the foreman or forewoman holds, is considerable, and in such cases where the fact of prejudice may be impossible to prove, yet its effect could

be so insidious and far-reaching, the courts have refused to require proof of prejudice before granting relief.

However, it is not simply the possibility of prejudice to a criminal defendant that mandates the reversal of convictions based on unconstittutional indictments. In fact, it is quite clear that a constitutional indictment may be returned by an all-white or an all-black grand jury, and the possibility of prejudice is no less if such a jury makeup occurred by chance rather than by design. Even a white defendant has standing to challenge a grand jury selection process which systematically excludes blacks. *Peters v. Kiff*, 407 U.S. 493 (1972). Many years ago it was recognized that the injury is more subtle, and runs deeper than direct racial prejudice against the defendant:

> [R]eversible error does not depend on a showing of prejudice in an individual case. The evil lies in the admitted exclusion of an eligible class or group in the community in disregard of the prescribed standards of jury selection. . . . The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts.

*Ballard v. United States*, 329 U.S. 187, 195 (1946).

In *Peters v. Kiff, supra*, 407 U.S. 493, the state opposed the issuance of the writ to a white prisoner, arguing that

> even if the grand and petit juries were uncontitutionally selected, petitioner is not entitled to relief on that account because he has not shown how he was harmed by the error. It is argued that a Negro defendant's right to challenge the exclusion of Negroes from jury service rests on a presumption that a jury so constituted will be prejudiced against him; that no such presumption is available to a white defendant; and consequently that a white defendant must introduce affirmative evidence of actual harm in order to establish a basis for relief.



*Id.* at 498. The Supreme Court expressly rejected this argument, holding that such discrimination by its very existence denies a defendant due process of law:

> [A] State cannot, consistent with due process, subject a defendant to indictment or trial by a jury that has been selected in an arbitrary and discriminatory manner, in violation of the Constitution and laws of the United States. Illegal and unconstitutional jury selection procedures cast doubt on the integrity of the whole judicial process.

The necessary remedy in such a case is also clear:

> [N]o State is at liberty to impose upon one charged with crime a discrimination in its trial procedure which the Constitution, and an Act of Congress passed pursuant to the Constitution, alike forbid. . . . [I]t is our duty as well as the State's to see to it that throughout the procedure for bringing him to justice he shall enjoy the protection which the Constitution guarantees. Where, as in this case, timely objection has laid bare a discrimination in the selection of grand jurors, the conviction cannot stand, because the Constitution prohibits the procedure by which it was obtained.

*Hill v. Texas*, 316 U.S. 400, 406 (1942).

It is therefore ordered that the cause be remanded to the district court for entry of an order providing that petitioners' convictions be set aside, and that within sixty days the petitioners be reindicted failing which the writ of habeas corpus shall be made absolute and petitioners released from custody.

In the United States Court of Appeals
for the Sixth Circuit

James E. Mitchell and James Nichols, Jr.,
Petitioners-Appellants,
vs.
Jim Rose, Warden,
Respondent-Appellee.
No. 77-1272.

**PETITION TO REHEAR ON BEHALF OF RESPONDENT-APPELLEE**

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**Statement of the Case**

This action is before this Court pursuant to an appeal from the ruling of the United States District Court for the Western District of Tennessee which denied the Petitioners-Appellants' applications for the writ of habeas corpus. On January 9, 1978 this Court rendered a memorandum decision reversing the District Court and remanding this cause to the District Court for entry of an order setting aside the petitioners' convictions and requiring the State to either reindict the petitioners or release them from custody within sixty days. The respondent-appellee here now files this petition for rehearing, respectfully requesting this Court to rehear and reconsider the decision previously filed.



Primarily, the respondent-appellee seeks rehearing on the basis of the law as set out in the recent United States Supreme Court decision of *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976). The *Stone* decision first appears in this record in an order entered by the District Judge on March 23, 1977 (Appendix 38A). That order was entered in response to a motion for hearing which was filed after the District Judge had decided the case by memorandum and order on February 17, 1977. (Appendix 35A). Actually, the case had been decided at the district level before the citation to *Stone v. Powell* ever appeared in the second order of March 23rd. Since the case was decided originally and primarily on other grounds, the issue of *Stone's* application was not thoroughly presented to this Court, and is not discussed in the Court's decision. The respondent-appellee now respectfully prays for rehearing and reconsideration of that decision in view of the law as set out in the *Stone* decision.

**Synopsis of the Facts**

The relevant facts are known to this Court and appear in the briefs, lower court decisions, and the decision of this Court. The respondent-appellee will not hear further elaborate or detail of those facts, but will simply offer a brief synopsis for the convenience of the Court:

The petitioners were indicted on November 6, 1972 for two counts of first degree murder by the Tipton County, Tennessee grand jury. That grand jury was composed of twelve individuals and one foreman. One of the individuals was a black woman. The regular foreman of the grand jury was ill at the time and the trial judge picked a former foreman who served in the absence of the regular foreman. This grand jury unanimously voted to indict the petitioners after hearing one police officer testify. The testimony of this officer primarily consisted of the petitioners' confessions, which he had already obtained. The

grand jury foreman did not vote on the indictment but did sign the indictment, as is required by Tennessee law. The grand jurors themselves, when indicting, did not know the race of the petitioners. On March 22, 1973 both petitioners were found guilty after a jury trial.

Prior to trial the petitioners filed a plea in abatement asking for dismissal of the indictment because the grand jury and the foreman of the grand jury had been selected in a racially discriminatory manner. The plea was overruled by the trial judge. The convictions were affirmed by the Tennessee Court of Criminal Appeals and certiorari was denied by the Tennessee Supreme Court. The United States District Court for the Western District of Tennessee dismissed the petitioners' application for the writ of habeas corpus. This Court reversed that decision, finding racial discrimination in the appointment of grand jury foremen in Tipton County. This Court further found that federal habeas corpus relief must be granted the petitioners without any proof of prejudice resulting from the exclusion of blacks from the post of grand jury foreman.

**The Issue**

I

ASSUMING THE SYSTEMATIC EXCLUSION OF BLACKS FROM THE POST OF GRAND JURY FOREMAN, MAY A STATE PRISONER BE GRANTED FEDERAL HABEAS CORPUS RELIEF ON THAT BASIS ALONE, AFTER BEING CONVICTED AT A TRIAL WHICH IS WITHOUT CONSTITUTIONAL DEFECT, AND AFTER HAVING AN OPPORTUNITY FOR A FULL AND FAIR LITIGATION OF THE CLAIM IN STATE COURTS, IN LIGHT OF THE UNITED STATES SUPREME COURT DECISION IN STONE V. POWELL, 428 U.S. 465, 96 S.Ct. 3037 (1976)?



**Brief**

In the landmark decision of *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037 (1976), the United States Supreme Court held that where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a State prisoner be granted Federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial.

The proposition here put forth is that the doctrine of *Stone* extends beyond cases involving Fourth Amendment claims and encompasses a case, such as the one sub judice, where a constitutional infirmity occurs during the accusatory stage of the criminal process and has been mooted by the subsequent trial and conviction. This very extension of the doctrine and philosophy of *Stone* was expressly recognized by the District Court in the instant case. In the post-decision order of March 23, 1977, Chief Judge Brown stated:

> "Since this court made the determination that this contention be dismissed, our determination is further supported by the decision of the Supreme Court of the United States in *Stone v. Powell*, — U.S. —, 49 L.Ed.2d 1067 (1976).
>
> "As we read that decision, where the claim of constitutional error does not go to the integrity of the fact finding process so far as the conviction is concerned, if the petitioner received a full and fair hearing in State court as to his claim, the Federal court will not review the determination by the State court. Thus, not only have we found the decision in the State court to be correct, but also it appears that, since the contention was fairly heard in State court petitioners are not entitled to another review here." (See Appendix 39A).

In *Castaneda v. Partida*, 430 U.S. 482, 97 S.Ct. 1272 (1977), Mr. Justice Powell, in dissent, specifically recognized that "a

strong case may be made that claims of grand jury discrimination are not cognizable on Federal habeas corpus after *Stone v. Powell* . . .". In fact, Mr. Justice Powell's dissent, joined by two other members of the Court, recognizes in *Castaneda* that the rationale of *Stone* is better applied to a case involving a tainted indictment than a case involving the admission of tainted evidence. As explained by Mr. Justice Powell:

> "Unlike the prisoner in *Stone*, who could complain that his conviction rested on evidence tainted by Fourth Amendment violations and could ask for a new trial with that evidence excluded, the prisoner in this case challenges only the now moot determination by the grand jury that there was sufficient cause to proceed to trial. He points to no flaw in the trial itself. As in *Stone*, the incremental benefit of extending habeas corpus as a means of correcting unconstitutional grand jury selection procedures might be viewed as outweighed by the acknowledged cost to other values vital to a rational system of criminal justice. See *Castaneda* at 1287, at Footnote 1."

The issue of extending the rationale of *Stone* was not before the Supreme Court in *Castaneda*. The issue had not been addressed in the lower courts and was not briefed or argued in the Supreme Court. However, the fact that three members of the Court still discussed the issue, without resolution, indicates that *Stone* is not a case which is to be confined to its facts. The petitioners-appellants' brief mistakenly indicates otherwise. On page 48, the appellants contend that the fact *Castaneda* was decided after *Stone* represents an affirmative decision by the Court not to extend *Stone* to grand jury discrimination cases. A closer reading of *Castaneda*, as discussed immediately above, indicates otherwise.

In the instant case this Court has granted the appellants the writ of habeas corpus and set aside their conviction for murder. This action has been taken after finding that the non-voting



grand jury foreman was selected in a discriminatory manner. This action was taken without any showing or prejudice by the appellants. This action was taken even though the integrity of the trial is not impugned. The constitutional error found by this Court occurred during the accusatory stage of the criminal proceedings against them and undoubtedly had no effect on their subsequent convictions. However, as stated in the opinion of this Court, the remedy ordered was not only directed at injury to the defendants. The injury sought to be remedied is the injury to the system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts. See *Ballard v. United States*, 329 U.S. 187, 185 (1946).

In short, this Court has not determined that Tennessee is incarcerating two innocent individuals. Rather, this Court has determined that the procedure utilized by the State is constitutionally defective. The convictions are set aside because the Constitution prohibits the procedure by which they were obtained. *Hill v. Texas*, 316 U.S. 400, 406 (1942). Ever since the earliest decisions involving systematic exclusion, the relief granted when discrimination is found, has been to quash the indictment and set aside the conviction without regard for any showing of actual prejudice and without a weighing of harmlessness. See *Strauder v. West Virginia*, 100 U.S. 303, 25 L.Ed. 664 (1880); *Pierre v. State of Louisiana*, 306 U.S. 354, 59 S.Ct 536, 83 LEd. 757 (1939); *Witus v. State of Georgia*, 385 U.S. 545, 87 S.Ct. 643 (1967). The rationale has consistently been that a conviction, no matter how overwhelming, cannot withstand a pretrial procedural constitutional error, no matter how miniscule. The thought is that the integrity of the system suffers, whether the prisoner does, or not. Therefore, the form of relief, reindictment and retrial or release, is at least partially granted to preserve the integrity of the system. This philosophy does not much differ from the deterrent purpose which has long supported the grant of Federal habeas corpus relief to State prisoners as-

serting Fourth Amendment claims. The State respectfully submits that the propriety of granting relief of this nature in cases such as the one sub judice, must be re-examined in view of the Supreme Court's decision in *Stone*, and the dissenting opinion in *Castaneda*.

Interest in promoting judicial integrity has never prevented the use of illegally seized evidence in grand jury proceedings. *United States v. Calandra*, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974). Furthermore, the law is settled that after a criminal defendant pleads guilty, he is not entitled to raise, in a Federal habeas corpus proceeding, independent claims relating to the deprivation of constitutional rights that antedated his plea, such as constitutional infirmities in the grand jury selection process. *Tollett v. Henderson*, 411 U.S. 258, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973). In other words, a state prisoner has no recourse through Federal habeas corpus if he subsequently pleads guilty after being indicted by a grand jury which purposefully and systematically excludes members of his race, and also bases the indictment upon the consideration and viewing of illegally seized evidence. Yet, according to this Court's decision, two individuals subsequently convicted by a jury are allowed Federal habeas corpus relief because the non-voting foreman of their grand jury has been found to be selected in a discriminatory manner. This is true even though the members of the grand jury heard only one witness and did not know the race of the petitioners-appellants. The State respectfully suggests that the only rational purpose served by this result, when the integrity of the fact finding-process, or trial, is unquestioned, is the promotion of the system or judicial integrity. Under the mandate of *Stone* this purpose must be weighed against the substantial societal cost of applying such relief.

In *Tollett* the United States Supreme Court held that the entry of a guilty plea represents a break in the chain of events which has preceded it in the criminal process. See *Tollett v.*



*Henderson*, 93 S.Ct. at p. 1608. From that point on, a criminal defendant may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. The State respectfully suggests that the same type of break occurred in the instant case on March 22, 1973, when a trial jury in Tipton County, Tennessee, found the petitioners-appellants guilty of murder. As suggested by Mr. Justice Powell in *Castaneda*, the grand jury determination that there was sufficient cause to proceed to trial was moot, since a trial jury has found guilt beyond a reasonable doubt. The State respectfully submits that from that point on, according to the authority of *Stone* and the dissent in *Castaneda*, the petitioners-appellants were foreclosed from seeking Federal habeas corpus relief on grounds attacking the composition of the grand jury, unless a showing is made that the defendants were not afforded a full and fair opportunity in State court. The District Court here found the petitioners-appellants were afforded this full and fair opportunity. Therefore, the petitioners-appellants are only entitled to seek Federal habeas corpus relief on the basis of constitutional claims attacking the fact-finding process which convicted them.

Finally, the respondent-appellees wish to be sure that this Court, in reaching its decision, has considered the concept of harmless error. In reading the Court's decision, the respondent has interpreted the last three pages to mean that harmless error is not a proper consideration in cases of this nature. This conclusion stems from the Court's discussion on the necessity of showing prejudice in a case of this nature. The Court has found that a showing of prejudice is unnecessary. The respondent has concluded, therefore, that the Court has considered and rejected the concept of harmless error. In any event, if the interpretation of the Court's opinion is incorrect, the respondent wishes to submit for rehearing and reconsideration the issue of harmless error. The respondent considers this issue to be a separate principle from those espoused in *Stone*. The respondent believes that this

Court could find the constitutional error harmless under the standards set out in *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

**Conclusion**

For all the above stated reasons, the respondent-appellee respectfully prays that this Honorable Court will grant this petition to rehear and reconsider the decision of this Court filed on January 9, 1978. The ends sought by respondent-appellee are affirmance of the District Court dismissal of the petitions for the writ of habeas corpus and a reinstatement of the convictions of the petitioners.

Respectfully submitted,

/s/ MICHAEL E. TERRY
MICHAEL E. TERRY
Assistant Attorney General

**Certificate of Service**

I hereby certify that copy of the foregoing petition to rehear has this day been forwarded, by first class postage paid mail, to the Honorable Walter C. Kurtz, Attorney for Petitioners-Appellants, University of Tennessee Legal Clinic, 1505 West Cumberland Avenue, Knoxville, Tennessee 37916, this 25 day of January, 1978.



No. 77-1272

United States Court of Appeals
For the Sixth Circuit

James E. Mitchell and James Nichols, Jr.,
Petitioners-Appellants,
v.
Jim Rose, Warden,
Respondent-Appellee.

**ORDER**
(Filed March 30, 1978)

Before: PHILLIPS, Chief Judge, PECK, Circuit Judge, and GRAY, Senior District Judge.

Upon consideration of the petition for rehearing filed herein by respondent-appellee, the court concludes that the issues raised therein were fully considered upon the original submission and decision of this case.

It is therefore ORDERED that the petition for rehearing be and it hereby is denied.

ENTERED BY ORDER OF THE COURT.

/s/ John P. Hehman
John P. Herman, Clerk of Court

JUN 24 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 77-1701

JIM ROSE, WARDEN

PETITIONER

VS.

JAMES E. MITCHELL and

JAMES NICHOLS, JR.

RESPONDENTS

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# BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

---

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-1701

JIM ROSE, WARDEN, Petitioner,

v.

JAMES E. MITCHELL and JAMES NICHOLS, JR.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

# BRIEF FOR RESPONDENTS IN OPPOSITION

## OPINIONS BELOW

The opinions below are correctly set out in the Petition.

## JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to those provisions set out in the Petition, the following provisions should be added.

Article One, Section Fourteen of the Constitution of the State of Tennessee is as follows:

Section 14 prerequisites to criminal charge--that no person shall be put to answer any criminal charge but by presentment, indictment or impeachment.

QUESTIONS PRESENTED

1. Whether the indictment and subsequent conviction of the respondents can stand when the method of selection of the grand jury foreman violates the Fourteenth Amendment.

2. Whether this Court's decision in Stone v. Powell, 428 U.S. 465 (1976) applies to non-Fourteenth Amendment claims so as to preclude federal habeas corpus relief in a case involving discrimination in the selection of a grand jury foreman.

3. Whether there sufficient reasons under the authorities of this Court to warrant the granting of the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

The respondents, both black men, were indicted on November 6, 1972, for two counts of first degree murder by the Tipton County, Tennessee, grand jury. On March 22, 1973, the petitioners were found guilty after a jury trial of the murders and given two (2) sixty (60) year sentences to run consecutively. Prior to the trial, the respondents filed a written pro se pre-trial motion in the nature of a plea in abatement in which they asked the court to dismiss the indictment for, in part, "systematic exclusion of Negroes...in regards to the position of the foreman of said grand jury." (R, State Trial, Vol. II, page 21).



Evidence adduced from the witnesses at the state court hearing on the plea in abatement established that three prior foremen of the grand jury could not remember there ever being a black grand jury foreman. (R, State Trial, Vol. I, 72, 75, and 81-82). The state produced no witnesses or evidence in the state court showing why there had never been a black grand jury foreman. One of the foremen testifying was the foreman of the Grand Jury indicting the respondents. He testified that he had been foreman of various grand juries in Tipton County since the early 1950's and that he had been asked to serve by the criminal court judge again as foreman of the grand jury for the November, 1972 Term because the regular foreman could not serve. (R, State Trial, Vol. I, 74-77). In Tennessee the criminal court judge appoints the foreman of the grand jury. T.C.A. 40-1506.

After hearing the evidence on the selection of the foreman of the grand jury and other matters, the state trial judge stated his ruling: "Plea in abatement will be denied." (R, State Trial, Vol. I, 96). The state trial judge made no written or oral findings of facts or law. The sum total of his rulings from the bench was that the plea was denied. The state judge's written order denying the plea in abatement reads in full: "Plea in abatement is overruled." (R, State Trial, Vol. II, 42).

After exhausting state remedies, the respondents filed a petition for writ of habeas corpus in the District Court of the Western District of Tennessee. During the course of those proceedings, the District Court asked for and received an affidavit from the grand jury foreman on April 14, 1976, which stated that the foreman did not vote

on the indictment of the respondents. On April 14, 1976, the petitioners also filed with the District Court an affidavit of the state trial judge. The state judge indicated that the foreman of the Tipton County November, 1972 Grand Jury, Mr. Peyton Smith, was personally selected by the trial judge as foreman when the regular foreman became ill. Mr. Smith was not a member of the regular jury panel or venire. As to racial discrimination, the trial judge stated:

> In my five counties, I do not have a black grand jury foreman, although I have a black member of my Jury Commission in one county. Most all of my Grand Juries and Petit juries have sizeable numbers of blacks on them, both men and women. I don't appoint Grand Jury Foreman very often because when their two year term expires, I usually reappoint them, thus they serve a long time and the problem doesn't come up very often. I don't think that I have really given any thought to appointing a black foreman but I have no feeling against doing so. (Emphasis added).

(R, Affidavit filed in District Court on April 14, 1976).[1]

ARGUMENT

The issue in this case involves the constitutionality of the process by which the foreman of

[1] During the habeas corpus proceeding in the District Court and on appeal to the United States Court of Appeals for the Sixth Circuit, there was an issue of whether or not constitutional standards had been violated in the selection of the grand jury itself. The Court of Appeals, because of its decision as to the foreman, found it unnecessary to reach this issue, but indicated that if it did, the case would probably have to be remanded for a further evidentiary hearing in this District Court. Mitchell v. Rose, 570 F.2d 129, 132-134 (6th Cir. 1978).



the Tipton County Grand Jury was selected. It is the simple position of the respondents, as it was the position of the United States Court of Appeals for the Sixth Circuit, that the respondents made a prima facie case of discrimination in the selection of the foreman, and the petitioners were not able to rebut that prima facie case. Therefore, the respondents were granted relief.

The petitioner makes much of its contention that the respondents were guilty of a violent crime and it couches much of its argument in emotional terms, interwoven with the facts of the crime. The facts of the crime are not relevant. Whether the crime be drunk driving or murder, this Court has continually held that discriminatory selection of grand juries [and one would assume discriminatory selection of the foreman of the grand jury] will not be tolerated. Such illegal action on the part of state officials will result in the voiding of the indictment and the granting of a new trial. The facts which are relevant to this case are those facts surrounding the selection of the grand jury foreman and the focus of this case should remain on those facts. The decision in the Court of Appeals was mandated because there had never been a black grand jury foreman within the memory of persons who testified in the state proceeding and the petitioner's attempt to rebut the prima facie case produced nothing except the affidavit of the appoining authority that he did not have anything against appointing a black, but he had just never thought of it. The case for relief is clear when the facts are judged against the prior decisions of this Court.

The petitioner has not shown this Court any

direct conflict with prior decisions of this Court or any conflict on the points of law involved in this case between the Courts of Appeals or other lower courts. The impact of the decision below will be limited; it will not bring about voiding of other indictments of those convicted in Tipton County, Tennessee, unless the unconstitutional practices continue prospectively.

I.

THE INDICTMENT AND SUBSEQUENT CONVICTION OF THE RESPONDENTS CANNOT STAND WHEN THE METHOD OF SELECTION OF THE GRAND JURY FOREMAN VIOLATES THE FOURTEENTH AMENDMENT.

A. THE FOREMAN OF THE GRAND JURY THAT INDICTED THE RESPONDENTS WAS SELECTED IN A MANNER VIOLATIVE OF THE FOURTEENTH AMENDMENT.

The position of foreman of a Tennessee grand jury is one of great importance in the Tennessee grand jury system.[2] In Hale v. Henderson, 485 F.2d 266 (6th Cir. 1973) the United States Court of Appeals for the Sixth Circuit stated that:

> "Petitioner also points out that the grand jury foreman has important statutory duties in Tennessee, T.C.A. 40-1510, 40-1622 (1955), and exercises a leadership role, as well as casting a vote in the grand jury." Id. at 270.

The grand jury foreman in Tennessee, (under the provisions of T.C.A. 40-1506), "sits as the thirteenth member of the grand jury." Since T.C.A. 40-1706 provides

[2]The grand jury indictment or presentment in Tennessee is a constitutional requirement. Article One, Section Fourteen, Constitution of Tennessee.



that "at least twelve grand jurors" must concur before an indictment can be returned, the foreman's vote can be the twelfth in returning the indictment. More importantly, even though the foreman may not always vote, he must sign the indictment. T.C.A. 40-1706. The indictment is void if not signed by the foreman. Bird v. State, 103 Tenn. 343, 52 S.W. 1076 (1899). In Tennessee there must always be a foreman in the finding of an indictment. State v. Collins, 65 Tenn. 151, 153 (1875). See 9 Michie's Digest of Tennessee Reports, Indictments, Information, and Presentments §22 (1937). While the petitioner may argue that the foreman in this case did not vote, the fact remains that the indictment is not valid under Tennessee law unless the foreman concurs with the vote and signed the indictment.

The grand jurors themselves are selected by random draw from the entire preselected jury panel. T.C.A. 40-1501. The jury panel (the jury pool) itself is chosen by the jury commissioners every two (2) years. See T.C.A. 22-221 et. seq. The grand jury foreman is chosen in a completely different manner. In essence the grand jury foreman is hand-picked by the criminal court judge. T.C.A. 40-1506. Also, as in this case, the grand jury foreman need not be a member of the jury panel or of the grand jury. T.C.A. 40-1507.

Tennessee Code Annotated §40-1510 sets out the statutory duties of the grand jury foreman. He must assist the District Attorney in ferreting out crime. Out of term he must advise the District Attorney with respect to law violations and provide him with names of witnesses which may be summoned before the next term of the grand jury. In

term the foreman may order the issuance of subpoenas for witnesses to go before the grand jury, unless directed otherwise by the District Attorney. Thus, it can readily be seen that the foreman in Tennessee has important statutory duties as to the day-to-day operation of the grand jury as well as to the validity of the indictments returned.

When the three prior grand jury foreman testified in the state court proceeding, they acknowledged that there had not been a black grand jury foreman in memory. The state produced no evidence to remove the taint of discrimination from the repondents' prima facie case. The state did, however, file the affidavit of the state trial judge who had presided over the case and who had selected the grand jury foreman.

The presiding trial judge stated as follows in his affidavit filed in the District Court: "I don't think that I have really given any thought to appointing a black foreman but I have no feeling against doing so." (Emphasis added). (R, Affidavit filed April 14, 1976, in District Court). This statement shows a negligent and callous exclusion of blacks by the person designated by statute to appoint the grand jury foreman. It is obvious that if the trial judge has never even "thought" of appointing a black forman then blacks have been excluded peremptorily by having never been considered for the position.

There is no doubt that the selection of the grand jury foreman just like the selection of the members of the grand jury is subject to the requirements of the Fourteenth Amendment. If a person is indicted by the grand jury, then, of course, blacks cannot be systematically excluded in the selection process by which the foreman is selected.



As was stated by the District Court for the Western District of Tennessee:

> If the [state] Court means to say that, if the twelve members of the grand jury other than the foreman were selected without systematic exclusion of Negroes, it would be constitutionally immaterial if Negroes were systematically excluded from the position of foreman, we cannot agree. We cannot agree because Whitus v. Georgia, supra [385 U.S. 545 (1967)] does not indicate that a grand jury that is twelve-thirteenths constitutional can render constitutionally valid indictments (Emphasis added).

Hale v. Henderson, 336 F.Supp. 512, 516 (W.D. Tenn.) (Bailey Brown, Chief Judge).

Hale v. Henderson involved a challenge to the selection process of the grand jury foreman in that it was alleged that racial discrimination was present in the selection process. When the Hale case finally came to be heard on the question of the selective discrimination of the selection of the grand jury foreman, Judge Mac Swinford, was sitting by special designation in the Western District of Tennessee. Judge Swinford indicated that if the petitioner therein had shown that the grand jury foreman had been chosen from outside the body of the grand jury venire, his claim would have been "well taken" as there had been a long history of complete exclusion of blacks from the position of grand jury foremen. In the case then before the Court, the foreman was a foreman pro tempore who had been chosen from among the members of that grand jury. The petitioners had not challenged the legality of the selection of the grand jury venire or of the grand jury itself, so the Court said that it must reach the conclusion "that the venire was selected in a manner that did not

systematically exclude blacks." (Emphasis added). Hale v. Henderson, 349 F.Supp. 567, 568 (1972), affd 485 F.2d 266 (6th Cir. 1973). Simply stated, Judge Swinford would have granted relief if the grand jury foreman in that case had been chosen from a source other than the grand jury. In this case, under facts almost identical to Hale v. Henderson, the grand jury foreman was chosen from a source other than the grand jury. Therefore, the opinion of Judge Swinford is on all fours with that of respondents in this case.

A showing that the percentage of blacks selected as foremen over a period of time (in this case 0% for as long as people could remember) varied significantly with the percentage of blacks in the population (32.4% according to 1972 statistical abstract) and that the selection process is amenable to discriminatory action is thus sufficient to warrant a prima facie finding of discrimination. Castaneda v. Partida, 430 U.S. 482, 494-495, 97 S.Ct. 1272, 1280 (1977); Alexander v. Louisiana, 405 U.S. 625, 92 S.Ct. 1221 (1972).[3] In Alexander this Court in a unanimous opinion held that where there was proof of opportunity for discrimination coupled with a disproportionately low number of Negroes throughout the selection process, discrimination is in fact proved.

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[3]On the entire subject of discrimination in the selection of grand juries and this Court's prior decisions, see Note, GRAND JURIES-GROUP DISCRIMINATION, 33 L.E.2d 783 (1973). A Tennessee case which reversed a conviction and voided the indictment for discrimination in the selection of a grand jury is Bonds v. State, 220 Tenn. 555, 421 S.W.2d 87 (1966).



The burden of proof necessary to overcome a prima facie case cannot be met by the self-serving testimony of the person who selects the venire that he did not intend to discriminate. Castaneda v. Partida, supra at 499 n. 19. It also cannot be overcome by the statement of the trial judge that he had "no feeling against" appointing a black foreman. Alexander v. Louisiana, supra at 632; Turner v. Fouche, 396 U.S. 346, 361 (1970). The petitioner in this case has failed to overcome the respondents' prima facie case of discrimination in the selection of the grand jury foreman. Thus, the decision of the Court of Appeals should therefore stand.[4]

## B. THE UNCONSTITUTIONAL SELECTION OF THE GRAND JURY FOREMAN NECESSITATES THE RELIEF GRANTED BY THE COURT OF APPEALS.

Normally, if the state fails to successfully rebut a prima facie case of discrimination, a writ of habeas corpus must issue since the indictment and all proceedings on that indictment are void. See Castaneda v.

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[4]The petitioners contend that the Court of Appeals somehow violated the clearly erroneous rule by reversing the District Court. It should be remembered that the District Court did not conduct an evidentiary hearing but based its findings on the state court transcript and certain affidavits filed in the District Court. Therefore, the "clearly erroneous" rule would not apply. Moore's Federal Practice, Vol 5A §52.03 [1], page 2624 (1977). Furthermore, the Court of Appeals did not disagree with the District Court's findings of facts, but rather with the District Court's application of the facts to the law. Of course, the Court of Appeals is not bound by the District Court's conclusions of law or findings that combine both fact and law, when there is an error as to the law. Moore's Federal Practice, Vol. 5A §52.03 [3], pages 2662-4 (1977).

Partida, supra. Despite the emotional argument of the petitioner, there is no need for the respondents to show prejudice, and a showing of no prejudice by the state is no defense. Peters v. Kiff, 407 U.S. 493 (1972); Hill v. Texas, 316 U.S. 400 (1942).

The powerful duties of the grand jury foreman have already been reviewed. [These duties make the grand jury foreman an extremely important person in the administration of criminal justice in the State of Tennessee and thus a person able to bring improper influence on the proceeding if he or she so desires]. Therefore, as in discrimination in the selection of the entire grand jury, the indictment in this case was properly voided. "The conviction cannot stand, because the Constitution prohibits the procedure by which it was obtained." Hill v. Texas, supra at 406. The Court of Appeals in this case succinctly states its reasons as follows:

> It seems clear that the potential for prejudice, given the position of authority and influence the foreman or forewoman holds, is considerable, and in such cases where the fact of prejudice may be impossible to prove, yet its effect could be so insidious and far-reaching, the courts have refused to require proof of prejudice before granting relief.

Mitchell v. Rose, supra at 136.

It is not the potential for prejudice alone that mandates the correctness of the opinion below. In fact, relief has been granted by this Court to a white defendant who was indicted by a grand jury from which blacks had been improperly excluded. Peters v. Kiff, supra. This relief is mandated as a vindication for the rights of those



excluded and because the courts owe a duty to the "law as an institution" and to the integrity of the process. This reasoning is just as valid when it is the foreman of the grand jury who has been illegally selected instead of the grand jury.

II

STONE V. POWELL, 428 U.S. 465 (1976) DOES NOT AFFECT FEDERAL HABEAS CORPUS CLAIMS INVOLVING ILLEGAL DISCRIMINATORY SELECTION OF A GRAND JURY FOREMAN.

Stone v. Powell has no application whatsoever to non-Fourth Amendment claims. The holding of Stone v. Powell is that the exclusionary rule will not be applied on collateral review of Fourth Amendment claims. This case does not involve a Fourth Amendment claim. In response to the dissenters' claim that Stone would bring about a "drastic withdrawal of federal habeas corpus jurisdiction," the majority replied:

> "With all respect the hyperbole of the dissenting opinion is misdirected. Our decision today is not concerned with the scope of the habeas corpus statute as authority for litigating constitutional claims generally. We do reaffirm that the exclusionary rule is a judicially created remedy rather than a personal constitutional right . . . and we emphasize the minimal utility of the rule when sought to be applied to Fourth Amendment claims in a habeas corpus proceeding . . . In sum, we hold only that a federal court need not apply the exclusionary rule on habeas review of a Fourth Amendment claim absent a showing that the state prisoner was denied an opportunity for a full and fair litigation of that claim at trial and on direct review. Our decision does not mean that the federal court lacks jurisdiction over such a claim, but only that the application of the rule is limited to

> cases in which there has been both such a showing and a Fourth Amendment violation." (Emphasis added).

Stone v. Powell, 428 U.S. 465, 494 n. 37, 96 S.Ct. 3037, 3052 n. 37.

There is nothing in prior precedents of this Court that indicate that a claim involving discrimination in the selection of a grand jury foreman is not cognizable on petition for habeas corpus in federal court. See generally Brown v. Allen, 344 U.S. 443 (1953).

The State of Tennessee thought so little of the Stone v. Powell argument that in its brief to the Court of Appeals, the petitioner stated in total:

> The state respectfully submits that the district judge's citation to Stone v. Powell came at a time when the case was already decided on other grounds. The citation is surplusage and not relevant or determinative of the issues before this Court.

(R, Reply Brief for Respondent-Appellee in the Court of Appeals, page 24).

The decision of the Court of Appeals does not even mention Stone v. Powell, and it was only after the decision was rendered by the Court of Appeals on January 9, 1978, that the petitioner raised the issue of Stone v. Powell in a Petition to Rehear. (R, Petition to Rehear on Behalf of Respondent-Appellee). On March 30, 1978, the Court of Appeals refused to reconsider its decision of January 9, 1978, and in so doing, simply stated that "the court concludes that the issues raised therein [the Stone v. Powell issue] were fully considered upon the original submission and decision of this case." (R, Order of United



States Court of Appeals for the Sixth Circuit, dated March 30, 1978).

The respondent is convinced that the petitioner's view of Stone v. Powell is incorrect. However, should this Court want to consider a drastic expansion of the doctrine of Stone v. Powell beyond Fourth Amendment claims, it should not come in a case where this Court does not even have the benefit of a reasoned decision by the Court of Appeals on the issue.

## III

## AUTHORITIES OF THIS COURT DO NOT SUPPORT THE GRANTING OF THE PETITION OF CERTIORARI IN THIS CASE.

### A. THERE IS NO CONFLICT OF DECISION.

The petitioner has shown no decision of this Court, of another Court of Appeals, or State Supreme Court to be clearly contrary to the decision of the United States Court of Appeals for the Sixth Circuit. The decision of the court below was entirely consistent with a long series of cases by this Court. See Castaneda v. Partida, supra; Peters v. Kiff, supra; Note 33 L.E.2d 783 (1973).[5]

[5] Petitioner's citation to Washington v. Davis, 426 U.S. 229 (1976) and Village of Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252 (1977), as authority for the contention that discrimination must be proved by positive proof of intent is inappositive. This Court made clear in Washington v. Davis that statistical disparity and the shifting of the burden of proof after the showing of prima facie case was still the clear law in the area of grand jury selection. Washington v. Davis, supra at 239 and 241. Again in Arlington Heights, this Court made clear its adherence to the traditional rules for jury selection cases. Arlington Heights v. Metro. Housing Development Corp., supra at 266 n. 13. See Castaneda v. Partida, supra at 493-494.

B. THIS CASE HAS LIMITED SIGNIFICANCE BEYOND THE LITIGANTS INVOLVED.

This Court's decision in Francis v. Henderson, 425 U.S. 536, 96 S.Ct. 1708 (1976), extremely limits the application of the decision of the court below. In most cases, Francis would prohibit any kind of collateral attack on a conviction by persons previously indicted and convicted in Tipton County, Tennessee, unless, like the respondents herein, they raised the issue prior to their state trial by proper motion. Francis thus eliminates the fear that this case would bring about wholesale voiding of prior convictions for persons not a party to this case.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1701

JIM ROSE, WARDEN,
Petitioner,

vs.

JAMES E. MITCHELL and
JAMES NICHOLS, JR.,
Respondents.

## BRIEF FOR PETITIONER

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IN THE

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No. 77-1701

JIM ROSE, WARDEN.
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vs.

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JAMES NICHOLS, JR.,
Respondents.

## BRIEF FOR PETITIONER

### OPINIONS BELOW

The memorandum opinion of the United States Court of Appeals for the Sixth Circuit was rendered on January 9, 1978, and is reported as *Mitchell v. Rose*, 570 F.2d 129 (6th Cir. 1978). This opinion is contained within the Appendix at pages 127-141.

This case arose as separate petitions for federal habeas corpus relief in the United States District Court for the Western District of Tennessee, Western Division. In the district court these

cases were originally styled: *Mitchell v. Rose, Warden*, Civil C-75-222, and *Nichols v. Rose, Warden*, Civil C-75-265. The memorandum decisions and orders of the district court are not reported, but are contained within the Appendix at pages 98, 106, 121.

The opinion of the Tennessee Court of Criminal Appeals, affirming the convictions of Mitchell and Nichols, was filed on June 5, 1974; and a copy is contained in the Appendix at page 36. This opinion is not reported. The Supreme Court of Tennessee denied certiorari on March 10, 1975. A copy of that court's order is contained in the Appendix at page 42.

## GROUNDS ON WHICH JURISDICTION IS INVOKED

The opinion and judgment of the Court of Appeals for the Sixth Circuit was entered on January 9, 1978. The state's petition to rehear was denied by order of that Court filed on March 30, 1978. The petition for certiorari was timely filed within ninety (90) days of that date, and granted by this Court on October 2, 1978. Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.



Habeas corpus is codified in Title 28, United States Code, which provides in pertinent part:

**§ 2241. Power to grant writ:**

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdiction . . .
>
> (c) The writ of habeas corpus shall not extend to a prisoner unless—
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States . . ."

**§ 2254. State custody; remedies in Federal Courts;**

> (d) In any proceeding instituted in a Federal Court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—
>
> (1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
>
> (3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

The Tennessee Rules of Criminal Procedure[1] provide in pertinent part as follows:

**Rule 6. The Grand Jury.—(a) Formation of the Grand Jury.**

[1] The Tennessee Rules of Criminal Procedure became effective on July 13, 1978. The Rules reflect the effort of the Supreme Court of Tennessee to provide uniform procedure in criminal matters. The Rules are to supplement the existing statutory procedural law, but the Committee comments to Rule 1 state: "It is intended that these rules be applied in every instance in which they address the procedure involved. If they do not expressly or by clear implication relate to the procedure in question, then existing law is to be applied. These rules take precedence over preexisting statutes and case law which are in conflict with them, but statutes passed subsequent to their adoption which conflict with these rules shall control".



(1) Formation at a Regular Term.—The judge of the court authorized by law to charge the grand jury and to receive the report of that body shall, on the first day of each term of court at which a grand jury is required to be impaneled, direct the names of all the qualified jurors in attendance upon the criminal courts of the county to be written on separate slips of paper and placed in a box or other suitable receptacle and drawn out by the judge in open court. The twelve qualified jurors whose names are first drawn shall, with the foreman, be the grand jury for the term and shall attend the court until dismissed by the judge or until the next term.

. . . .

(b) Vacancies on the Grand Jury.

. . . .

(2) Vacancy as to Grand Jury Foreman.—If for any reason the foreman of the grand jury is unable to serve or is relieved, the court shall appoint a new foreman according to Subdivision (g) until such time as the foreman is able to serve or until expiration of his term.

. . . .

(g) Appointment, Qualifications, Term, Compensation, Vote, and Duties of Foreman.—The judge of the court authorized by law to charge the grand jury and to receive the report of that body shall appoint the foremen of the grand juries in the counties of their respective jurisdictions. If concurrent grand juries are impaneled, a foreman shall be appointed for each grand jury. Every person appointed as a foreman shall possess all the qualifications of a juror. The foreman shall hold office and exercise his powers for a term of two (2) years from appointment; however, in the discretion of the presiding judge, he may be removed, relieved, or excused from office for good cause at any time. It shall be the duty of such foremen of grand juries to assist

and cooperate with the district attorney general in ferreting out crime, to the end that the laws may be faithfully enforced; and such foremen are directed out of term to advise the district attorney general with respect to law violations and furnish him names of witnesses, whom the district attorney general may, if he deem proper, order summoned to go before the grand jury at the next term. In term time, the foreman or the district attorney general may order the issuance of supoenas for witnesses to go before the grand jury. The foreman may vote with the grand jury and his vote shall count toward the twelve necessary for the return of an indictment. A foreman shall receive as compensation a sum to be determined by the county legislative body, to be paid out of the county treasury in the same manner as jurors are paid, and shall receive no other compensation for his services. Such compensation shall not be less than ten dollars ($10.00) per day for each day the grand jury of which he is foreman is actually in session and such sum shall not be diminished during his term of appointment.

. . . .

(j) Witnesses Before Grand Jury.

. . . .

(4) Oath of Grand Jury Witnesses.—Witnesses thus summoned may be sworn by the clerk, or by the foreman of the grand jury, who shall indorse the fact on the subpoena, and sign his name to such indorsement officially.

(5) Power of Grand Jury Foreman to Administer Oath.—The foreman of the grand jury shall have power to administer oaths to all witnesses brought before the grand jury to testify as to the violations of the criminal laws in all cases where the clerks of the criminal and circuit courts may administer said oath.



Tennessee Code Annotated provides in pertinent part as follows:

**40-1506.** Appointment and term of foreman or forewoman.—Judges having criminal jurisdiction in any county, are authorized, and required to appoint the foremen or forewomen of the grand juries in the counties of their respective jurisdictions; and said foremen or forewomen shall hold office and exercise their powers for a term of two (2) years from appointment, unless for good cause, in the discretion of the presiding judge, he may be removed, relieved, or excused from office at any time. Said foreman or forewoman shall be the thirteenth member of each grand jury organized during his term of office, having equal power and authority in all matters coming before the grand jury with the other members thereof. [Acts 1919, ch. 37, § 1; Shan. Supp., § 5832a1; mod. Code 1932, § 10026, Acts 1976 (Adj. S.), ch. 383, § 1.]

**40-1507.** Qualifications of foreman or forewoman.—Every person appointed as a foreman or forewoman of the grand jury under § 40-1506 shall be at least twenty-five (25) years of age, and shall be a good and lawful man or woman, possessing all the qualifications of a juror. Provided that no justice of the peace shall be eligible for appointment as foreman or forewoman of the grand jury, the provisions of this section requiring that no justice of the peace shall be eligible for appointment as foreman or forewoman of the grand jury shall not apply in those counties where arraignment in criminal cases is had exclusively before general sessions court. [Acts 1919, ch. 37, § 2; Shan. Supp., § 5832a2; Code 1932, § 10027; Acts 1957, ch. 252, §§ 1, 2; 1976 (Adj. S.), ch. 383, § 2.]

**40-1510.** Duties of foremen or forewomen.—It shall be the duty of such foremen or forewomen of grand juries to assist and cooperate with the district attorney in ferret-

ing out crime, to the end that the laws may be faithfully enforced, and such foremen or forewomen are directed out of term to advise the district attorney with respect to law violations and furnish him names of witnesses, whom the district attorney may, if he deem proper, order summoned to go before the grand jury at the next term. In term time, the foreman or forewoman may order the issuance of subpoenas for witnesses to go before the grand jury, unless otherwise ordered by the district attorney. [Acts 1919, ch. 37, § 4; Shan. Supp., § 5832a4; Code 1932, § 10029; Acts 1976 (Adj. S.), ch. 383, § 5.]

**40-1706.** Concurrence in true bill.—An indictment cannot be found without the concurrence of at least twelve (12) grand jurors, and, when so found, shall be indorsed "A true bill," and the indorsement signed by the foreman. [Code 1858, § 5093; Shan., § 7055; Code 1932, § 11600.]

## QUESTIONS PRESENTED

1. Whether Discrimination in the Selection of the Non-Voting Foreman of the Grand Jury Is a Basis Upon Which a State Prisoner May Be Granted Federal Habeas Corpus Relief When the Subsequent Trial Is Free of Reversible Constitutional Error, When There Has Been No Demonstration of Actual Prejudice and There Is No Rational Basis to Presume Prejudice, and When the State Has Provided an Opportunity for Full and Fair Litigation of the Claim?

2. Whether the Decision of the Court of Appeals Comports With the Clearly Erroneous Standard and With This Court's Decisions Interpreting the Equal Protection Clause?

3. Whether, Assuming Arguendo, Systematic Exclusion of Blacks From the Post of Grand Jury Foreman in Tipton County,



the Doctrine of Harmless Error Can Be Applied When There Has Been No Actual Prejudice and No Rational Basis Exists Upon Which to Presume Prejudice?

## STATEMENT OF THE CASE[2]

On October 28, 1972 Claudie Greer and William Nabors were murdered by the respondents during an armed robbery of a cafe[3] in Tipton County, Tennessee. The respondent Nichols began the criminal episode by pistol whipping a customer. Then Nichols, wielding two pistols, forced the proprietor to hand over about five or six hundred dollars. Nichols also took other money from the proprietor and customers in the cafe. Then, for no apparent reason, Nichols fired several shots into the back room of the cafe and fled. Eyewitnesses testified that Claudie Greer, standing in the back room, fell and subsequently died after the shots were fired from the front room. Proof later showed that Greer was killed by a shot from a .38 caliber pistol.

Simultaneously, the co-respondent James Mitchell, armed with a sawed-off shot gun, was in the process of robbing persons in the back room. William Nabors was among these people. When Nabors bent over to pick up some change from the floor, Mitchell shot him through the mouth with the sawed-off shot

---

[2] Unless otherwise indicated, the references contained within this statement are to pages of the state court record. The state court record was before both the federal courts below.

[3] The race of the defendants, the victims, or the eye-witnesses was, of course, not an issue at trial. However, since the Court of Appeals has found racial discrimination and presumed prejudice, the race of these people is perhaps relevant here to demonstrate the total absence of prejudice and the lack of any evidence showing discriminatory intent. The only evidence of race appears in Volume II, page 87 of the trial where on redirect examination the cafe's proprietor testified he is black and black customers comprised almost 100 percent of his business. There is nothing in the record to support any conclusion except that the victims and witnesses were also black.

gun, ending his life. Mitchell then went into the front room, took more money from the proprietress and also fled.

The next day Mitchell and Nichols were arrested together in the Memphis apartment of Nichols' girlfriend. A .38 caliber pistol was recovered from Nichols at the time of his arrest, and a ring taken during the robbery was found at the scene of arrest. A sawed-off shot gun and blood splattered clothing were then found in the apartment of Mitchell's girlfriend. After his arrest, Mitchell gave a confession to members of the Memphis Police Department.

Nichols and Mitchell were jointly indicted in two indictments on November 6, 1972. The grand jury was composed of twelve jurors, one being a black woman, and one acting foreman. The regular foreman of the grand jury was unavailable and the trial judge chose a former foreman as his substitute. The former foreman was chosen to serve by the trial judge because he had previously served as a regular foreman, had previously served as an acting foreman, had been willing to perform in the past, and according to the judge's experience had always served well.[4] Although some twenty (20) witnesses were scheduled to testify before the grand jury, the grand juors unanimously voted to indict the respondents after hearing one police officer testify. This witness did not mention the race of the respondents and this fact was not known to either the acting foreman or the other members of the grand jury.[5] The acting foreman did not vote on the indictment because of the unanimity, but he did sign the indictment, as is required by Tennessee law. (T.C.A. § 40-1706).

---

[4] See Affidavits submitted by the state trial judge and the acting foreman. These affidavits formed part of the state's response in the U. S. District Court and were also before the Court of Appeals. (App. pp. 102-111).

[5] See Affidavit of acting foreman, App. p. 102, and the testimony on the plea in abatement. App. p. 111.



Prior to trial, the petitioners filed a plea in abatement asking for dismissal of the indictment and alleging the grand jury and foreman were selected in a constitutionally offensive manner. (p. 21). On March 13, 1973 an evidentiary hearing was held in state court. At that hearing, three jury commissioners of Tipton County, three former foremen of the Tipton County Grand Jury, eleven of the grand jurors who indicted the respondents (one was out of town), and the circuit court clerk of Tipton County all testified. All witnesses were subject to full examination by counsel for the respondents. The proof elicited demonstrated the plea in abatement was without merit. There was a total lack of countervailing evidence. The state court overruled the plea in abatement. (App. pp. 35, 36)

Trial was held on March 21 and March 22 of 1973 in the Circuit Court of Tipton County. The state introduced the testimony of five eyewitnesses who identified Nichols and five eyewitnesses who identified Mitchell as the murderers. (pp. 65, 70, 90, 92, 98, 126, 131, 142, 143, 211, 242, 243, 244, 255, 266, 282). In addition, a redacted version of Mitchell's confession was introduced. Proof showed the recovery of the murder weapons from the respondents and showed that a ring stolen during the crime was recovered from the scene of arrest. The defense proof consisted almost wholly of a testimonial denial by Nichols of any participation. The jury found both respondents guilty of first degree murder and sentenced them to sixty years incarceration on each count. (pp. 357-360).

The respondents appealed their convictions first to the Tennessee Court of Criminal Appeals where they made some twelve assignments of error including assignments attacking the composition of the grand jury and the selection process for grand jury foreman. In a unanimous opinion, the Court of Criminal Appeals affirmed the convictions and found, "the facts here do not demonstrate a systematic exclusion of Negroes upon racial

grounds". (App. pp. 38, 39) The Supreme Court of Tennessee denied certiorari. (App. 42).

The respondents' resort to the federal court system began as separate applications for federal habeas corpus relief in the United States District Court for the Western District of Tennessee, Western Division. The initial petitions for habeas corpus relief each included some eleven grounds. In the district court, the cases were consolidated and twice referred to the magistrate for report. The state filed four separate responses, the entire state transcript, and affidavits from the state trial judge and the acting foreman of the indicting grand jury. After reviewing the first state response, the state trial court record, and the first report on reference, the district judge, on February 17, 1976, dismissed all claims except the selection issues and a *Bruton* issue. (App. p. 98). On these issues, the district court ordered further response and another reference to the magistrate. On February 17, 1977, by memorandum and order, the district court found the *Bruton* violation to be harmless beyond a reasonable doubt and further found that the acting foreman was selected for other than racial reasons. The petitions were dismissed. (App. p. 123). A final order denying a motion to amend judgment was entered by the district court on March 23, 1977. (App. p. 124).

The respondents appealed to the Court of Appeals for the Sixth Circuit which reversed the district court on January 9, 1978. (App. p. 127). The Court of Appeals found discrimination in the selection of the grand jury foreman in Tipton County, and set aside the convictions. The state sought the Writ of Certiorari from this Court which was granted on October 2, 1978.



## ARGUMENT

### I

**State Prisoners Should Not Be Granted Federal Habeas Corpus Relief on a Claim Questioning the Selection of the Non-Voting Foreman of Their Grand Jury When Their Subsequent Trial Is Free of Reversible Constitutional Error, When There Has Been No Demonstration of Actual Prejudice and There Is No Rational Basis to Presume Prejudice, and When the Claim Has Been Fully and Fairly Litigated in State Court.**

The Court of Appeals for the Sixth Circuit has voided two state first degree murder convictions obtained more than five years ago. The Sixth Circuit's decision is based on a finding that the non-voting acting foreman of the indicting grand jury was selected in a discriminatory manner. The Sixth Circuit has granted habeas corpus relief on the basis of perceived error occurring during the now moot accusatorial stage. The relief has been granted without a demonstration of prejudice and upon a record which can not support any reasonable presumption of prejudice. The Sixth Circuit decision comes after three state courts had denied relief, the district court had dismissed the petitions without an evidentiary hearing, and despite a record which demonstrates:

1. The race of the respondents was unknown to either the acting foreman or other members of the grand jury (App. pp. 28, 29, 33);

2. the grand jury contained a black woman, who testified in state court and established the total absence of any racial consideration; (App. p. 32)

3. the regular foreman was unavailable and a former foreman was picked by the trial judge to replace him solely because the trial judge knew of his demonstrated ability, his willingness

to serve, and his availability; App. pp. 19-24, 105, 106, 112, 113)

4. the acting foreman did not vote on the indictment because of the grand jury's unanimity; (App. p. 105)

5. although some twenty witnesses were scheduled, the grand jury unanimously voted to indict after hearing one witness; (App. p. 24)

6. the selection of the grand jury itself is an issue previously resolved in favor of the state; (App. p. 122)

7. the subsequent trial was without reversible constitutional error and the petit jury was not an issue;

8. the evidence against respondents at trial included five eyewitness identifications for each, a confession, recovery of the murder weapons from the respondents, and other physical evidence; and (App. pp. 91, 116-121)

9. the issue of grand jury foreman selection was fully and fairly litigated in state court. (App. pp. 3-36)

The Great Writ, habeas corpus ad subjiciendum, has deservedly enjoyed a prestigious place in the history of Anglo-American jurisprudence. Elaborate and scholarly discussions of the Great Writ and its evolution can be found in the decisions of this Court and other legal writings. See *Fay v. Noia*, 372 U.S. 391, 399-426, 449-463 (1963); *Prieser v. Rodriguez*, 411 U.S. 475, 484-487 (1973); *Stone v. Powell*, 428 U.S. 465 (1976); "Developments in the Law—Federal Habeas Corpus", 83 Harv. L. Rev. 1038, 1042-62, 1263-74 (1970); Oakes, "Legal History in the High Court—Habeas Corpus", 64 Mich. L. Rev. 451-68 (1966); Bator, "Finality in Criminal Law and Federal Habeas Corpus for State Prisoners", 76 Harv. L. Rev. 441, 463-507 (1963). As Mr. Justice Powell wrote in *Schneckloth v. Bustamonte*, 412 U.S. 218, 255-56 (1973):



> Much, of course, has transpired since that first Habeas Corpus Act (citations omitted). The scope of federal habeas corpus for state prisoners has evolved from a quite limited inquiry into whether the committing state court had jurisdiction (citations omitted), to whether the applicant had been given an adequate opportunity in state court to raise his constitutional claims (citation omitted); and finally to actual redetermination in federal court of state court rulings on a wide variety of constitutional contentions (citation omitted).

The noble purpose of the Great Writ was and should remain to determine whether a violation of a personal constitutional right has resulted in the deprivation of liberty. See *Fay v. Noia*, 372 U.S. at 423, 424. However, through the years this noble purpose has been joined by other purposes at the substantive scope of the writ was expanded. This expansion has resulted from the employment of the Great Writ to further society's interest in preserving the integrity of the judicial system and implementing minimum constitutional standards within the nation's criminal justice system. Society's interests have been fostered by this expansion, but the issue of undeserved or unjust incarceration has become almost secondary. In fact, since this Court's decision in *Fay v. Noia*, federal habeas corpus relief has, in reality, been a continuation of the state appellate process. Society's interests now demand a reconsideration of the applicability of this form of relief to pre-trial constitutional errors which have no real relationship to the deprivation of liberty. The issuance of the writ should again depend primarily on a relationship between constitutional error and deprivation of liberty.

The Sixth Circuit has not determined that Tennessee is incarcerating two possibly innocent individuals. Any reasonable person viewing the overwhelming evidence admitted at trial must conclude that retrial will reach the same result if the state can resurrect evidence which is now more than five and one-half

years old.[6] Therefore, if guilt is unquestioned, if the trial is without reversible flaw, and if there is no basis to reasonably presume any prejudice to respondents from the preceived error, then the rationale supporting the writ's issuance must be remedial. The Sixth Circuit's opinion supports this conclusion: ". . . there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts". (See App. p. 140). The result is that a conviction, no matter how overwhelming, can not withstand a pre-trial procedural constitutional error unrelated to the fact finding process. This philosophy is remedial and similar to the rationale which formerly supported federal habeas relief to state prisoners asserting Fourth Amendment claims.

The decision of the Sixth Circuit, in reality, represents an expansion of the substantive scope of federal habeas corpus relief for remedial purposes. At least since *Neal v. Delaware*, 103 U.S. 370, 397 (1881) this Court has sanctioned the extraordinary relief of quashing the indictment when the grand jury itself was selected through a racially discriminatory system. However, not until this case has this extraordinary relief been applied to a situation when only the selection of a non-voting foreman is at issue. The extraordinary relief was allowed in *Neal*, to a great extent, because of a lack of existing alternative remedies, and because of the importance of the grand jury.[7] As a result,

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[6] This condition is not a small consideration and is a significant cost factor. Reconstruction of a trial is never a certainty, especially after five and a half years. The cost to society in terms of money is obvious. The cost in other terms is also quite clear. See, *Stone v. Powell*, 96 S. Ct. at 3050-52; *Schneckloth*, at 259 (Powell, J., concurring) and *Kaufman v. United States*, 394 U.S. 217, 231 (1969) (Black, J., dissenting). Perhaps, the biggest cost is the loss of public confidence in the system. The system has obviously failed when the cost overcomes the benefit. The criminal justice system should not be a game of endurance where guilt or innocence is a secondary consideration.

[7] See also *Hale v. Henderson*, 485 F.2d 266, 272 (6th Cir. 1973) (Lambros, J., concurring).



grand jury selection systems have been changed and society has been the benefactor.[8] The cost has been justified. However, alternative remedies now exist. *Turner v. Fouche*, 396 U.S. 346 (1970) and *Carter v. Jury Commission*, 396 U.S. 320 (1970) were not habeas cases and demonstrate the benefits can be achieved through class action litigation without much of the cost attendant to habeas corpus proceedings. Other alternatives also exist including criminal sanctions, 18 U.S.C. § 243; and the state remedies which in Tennessee include two levels of appellate review and the state post-conviction law. Tenn. Code Ann. § 40-3801, et sequel. Finally, an individual is entitled to seek the direct review of this Court after a decision of the State Supreme Court.

As a remedial device the Sixth Circuit's decision is a failure and classically demonstrates the peculiar inappropriateness of habeas corpus for such purposes. The reindictment and retrial of the respondents does not change the system of foreman selection in Tennessee. The impact of the decision, besides the waste in resources, may only be to subject each trial judge to a subjective scrutiny of his motivations for selection. Thereis no real benefit to society since a racially motivated judge would presumably disguise his true motivations. Assuming error, the cure is not attained, the cost outweighs the benefit, the system has failed.[9]

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[8] See *Whitus v. Georgia*, 385 U.S. 545 (1966) (coding by race eliminated); *Hernandez v. Texas*, 347 U.S. 475 (1954) (exclusion by ancestry barred); *Norris v. Alabama*, 294 U.S. 587 (1935) (rule of exclusion adopted).

[9] Assuming the remedial goal is to assure that black citizens have equal access to the post of foreman, then the position of petitioner is that the present system works. It is fair to assume that the people of Tennessee will today select as their trial judges people of integrity who realize their responsibility to allow and encourage all citizens to participate in the system. It is unfair to test this assumption by history, either in Tennessee or anywhere else. More importantly, if this system does not work then the change is best made through other procedures, including class action litigation (where the relief can be more than retrial affords); legislative action; and even the political process.

In *Stone v. Powell*, 428 U.S. 465 (1976), this court determined that, as the remedial purposes embodied in the Fourth Amendment exclusionary rule would no longer effectively be served through collateral federal habeas corpus relief,[10] the need for § 2254 adjudication of such claims (once the state has provided a full and fair opportunity to litigate the claim) was far outweighed by the judiciary's interests in "(i) the most effective utilization of limited judicial resources; (ii) the necessity of finality in criminal trials; (iii) the minimization of friction between federal and state systems of justice, and (iv) the maintenance of the constitutional balance upon which the doctrine of federalism is founded". *Stone v. Powell*, 428 U.S. 465, 491 n.31 (1976).

The proposition here put forth is that the rational of Stone should extend beyond cases involving Fourth Amendment claims and should encompass a case such as the one sub judice, where a constitutional infirmity[11] occurs during the accusatory stage of the criminal process and has been mooted by the subsequent trial and conviction.[12] The nature of respondent's

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[10] 28 U.S.C. §2254.

[11] This characterization is solely for the purpose of presenting this portion of the brief. No concession of error in the selection process is intended.

[12] This very extension of the doctrine and philosophy of *Stone* was expressly recognized by the district court in the instant case. In the post-decision order of March 23, 1977, Chief Judge Brown stated: "Since this court made the determination that this contention be dismissed, our determination is further supported by the decision of the Supreme Court of the United States in *Stone v. Powell*, — U.S. —, 49 L. Ed. 2d 1067 (1976). As we read that decision, where the claim of constitutional error does not go to the integrity of the fact finding process so far as the conviction is concerned, if the petitioner received a full and fair hearing in state court as to his claim, the federal court will not review the determination by the state court. Thus, not only have we found the decision in the state court to be correct, but also it appears that, since the contention was fairly heard in state court petitioners are not entitled to another review here". See App. p. 124.



claim; its attenuated relation to the integrity of the fact finding process, fairness of the trial, or guilt or innocence of the accused; and the particular inappropriateness of federal habeas corpus as a means to adjudicate the interests of society, all weigh against the issuance of the writ in this case.

In *Castaneda v. Partida*, 430 U.S. 482 (1977), Mr. Justice Powell, in dissent,[13] specifically recognized "a strong case may be made that claims of grand jury discrimination are not cognizable on federal habeas corpus after *Stone v. Powell* . . ." Mr. Justice Powell explained in *Castaneda* that the rationale of *Stone* is better applied to a case involving a tainted indictment than a case involving the admission of tainted evidence. As stated by Mr. Justice Powell:

> Unlike the prisoner in Stone, who could complain that his conviction rested on evidence tainted by Fourth Amendment violations and could ask for a new trial with that evidence excluded, the prisoner in this case challenges only the now moot determination by the grand jury that there was sufficient cause to proceed to trial. He points to no flaw in the trial itself. As in *Stone*, the incremental benefit of extending habeas corpus as a means of correcting unconstitutional grand jury selection procedures might be viewed as outweighed by the acknowledged costs to other values vital to a rational system of criminal justice.

*Castaneda*, at 1287, footnote 1.

The matter sub judice presents facts more appropriately suited for an application of the *Stone* rationale than the facts

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[13] Mr. Justice Powell's dissent was joined by the Chief Justice and Mr. Justice Rehnquist. Mr. Justice Stewart, separately dissenting, stated that he was in substantial agreement with the other dissenting opinions. *Castaneda*, at 1287. The issue of extending the rationale of Stone, was not before the Court in *Castaneda*. The issue had not been addressed in the lower courts and was not briefed or argued in this Court.

before this Court in *Castaneda*. In *Castaneda* the composition of the entire Grand Jury was in question. In this matter, only the selection of the non-voting foreman is in question. Furthermore, in *Castaneda* the Mexican-American surname of the defendant is a fact upon which a presumption of prejudice could rest. In the instant matter the evidence demonstrates that the race of respondents was unknown to the grand jury when the indictment was returned. (App. pp. 28, 29, 33)

As indicated in *Castaneda*, there is no peculiar characteristic regarding claims of grand jury selection irregularities which would weigh against an extension of the *Stone* logic beyond the Fourth Amendment. This Court has previously stated federal habeas relief is not automatically available to a state prisoner who pled guilty and later attacked the grand jury selection process, *Tollett v. Henderson*, 411 U.S. 258 (1973). More recently this Court held a state prisoner was not entitled to habeas relief on grand jury selection grounds when he failed to conform with a state requirement that such objections be raised before trial, absent a showing of both cause and actual prejudice. *Francis v. Henderson*, 425 U.S. 536 (1976). Both the result and rationale of *Stone*, *Francis*, and *Tollett* are inconsistent with the decision of the Sixth Circuit in this case.[14]

*Stone*, *Francis*, *Tollett* and *Swain* amply demonstrate the sensitivity which this Court has always applied to cases which require a consideration of the need to preserve and maintain rational state procedures even when they affect (and override) federal constitutional claims. The grant of federal collateral relief must be balanced against other values endemic to a rational system of criminal justice; including the need to preserve the integrity of the state system, the need to avoid duplicative judicial effort, and the values of finality.[15] See *Preiser v. Rodriguez*, 411 U.S. 475, 492 (1973); *Case v. Nebraska*, 381 U.S. 336, 340 (1965) (Clark, J., concurring); *Henry v. Mississippi*, 379 U.S. 443, 452-453 (1965); *Younger v. Harris*, 401 U.S. 37 (1971), c.f. Kirkland, the Federal Court Abstention Doctrine, 24 F.R.D. 481 (1959).

[14] See also *Swain v. Pressley*, 97 S.Ct. 1224 (1977) where the availability of an adequate local statutory remedy for the adjudication of federal rights in the District of Columbia was seen as sufficient to vitiate the need for 28 U.S.C. § 2255 relief.



The dual system of review resulting from the expansion of the scope of federal habeas corpus has come under increasingly sharp attack by both federal and state judges and legal commentators as both an inappropriate use of scarce judicial resources and a needless federal imposition on state authority. See Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142 (1970), Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441 (1963), Speech of Justice Paul C. Reardon, Address at the Annual Dinner of the Section of Judicial Administration, American Bar Association, San Francisco, Cal., August 14, 1972 ((pp. 5, 9, 10) (quoted in part in *Schneckloth v. Bustamonte*, 412 U.S. 218, 264 (n. 21 (1972)).[16]

[15] The value of finality is more than economic. Continual relitigation of alleged errors years after conviction and incarceration is costly in terms of a rational system of corrections and rehabilitation. " . . . we should at least tentatively inquire whether an endless reopening of convictions, with its continued underlying implication that perhaps the defendant can escape from corrective sanctions after all, can be consistent with the aim of rehabilitating offenders . . . The idea of just condemnation lies at the heart of criminal law, and we should not lightly create processes which implicitly belie its possibility". Bator, supra at 452.

[16] For an example, see *United States ex rel. Stephen J.B. v. Shelley*, 430 F.2d 215 (2d Cir. 1970) where a district judge without hearing any further evidence, annulled the unanimous holding of 13 New York appellate judges including a unanimous opinion of the Court of Appeals. *People v. Stephen J.B.*, 23 N.Y.2d 611, 246 N.E.2d 344, 298 N.Y.S.2d 489 (1969) on the admittedly close question of the application of *Miranda v. Arizona*, 384 U.S. 436 (1966). What made this ruling especially disturbing is that the defendant had al-

Such duplication of effort has not been without substantial cost to the federal judiciary. Petitions for federal habeas corpus filed by state prisoners have increased from 1,020 in 1961 to 7,033 in 1978. Although after *State v. Powell*, the number of such petitions had decreased (down 12.3% between 1976 and 1977), it is apparent that such filings are on the increase again (up 2.4% to 7,033 between 1977 and 1978). During the year 1978, state prisoner petitions (including both civil rights and habeas corpus), represented 12.2% of all civil filings in the district courts. In the appellate courts state prisoner petitions accounted for 7.7% of the filings. Although this marks a decrease of 11.2% over the last year, it is worthy to note that such petitions have taken up over 13% of the appellate work-load in three circuits, amounting to over 27.2% of all filings in the Fourth Circuit. See *1978 Annual Report of the Director of the Administrative Office of the United States Court*, 47, 76.

The determination in 1953 that state procedures for the remedy of federal constitutional claims were inadequate,[17] which, in part, prompted this court's decision in *Fay v. Noia*, 372 U.S. 391 (1963), is no longer true. The states have continuously sought to strengthen their own post-conviction procedures[18] and have not hesitated to disqualify juries where a

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ready been placed on probation, and because of his juvenile status, his conviction carried with it no civil consequences. See *Shelly, supra*, 430 F.2d 215, 219 (dissent). In the instant case the judgment of 10 judges (9 state and 1 district judge) has been overturned by the Court of Appeals.

[17] See Report of the Special Committee on Habeas Corpus to the Conference of Chief Justices, June 1953, printed in H.R. Rep. No. 1293, 85th Cong. 2d Sess. 7 (1958), Reits, Federal Habeas Corpus, 108 U.Pa.L.Rev. 461, 466 (1960), *Case v. Nebraska*, 381 U.S. 336, 339 (1965) (Clark, J. concurring).

[18] See generally, State Post Conviction Remedies and Federal Habeas Corpus, 12 W&M L.Rev. 149 (1970), Eisenberg, Post-Conviction Remedies in the 1970's, 56 Marquette L. Rev. 69 (1972).



prima facie case of discrimination in the choosing of the venire has been shown.[19] The Uniform Post Conviction Procedures Act[20] has been approved in eleven (11) states, and many others have seen fit to pass their own comprehensive statutes in recent years.[21] Justice Powell stated the current position of this Court best in *Stone v. Powell*, ". . . we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the states." *Stone v. Powell*, 428 U.S. at 493 (n. 35).

The Sixth Circuit's grant of federal habeas corpus relief in this cause is contrary to recent decisions of this court interpreting the substantive scope of the writ. In fact, the Sixth Circuit's decision represents an unnecessary extension of the writ's substantive scope. The relief ordered in this cause is contrary to the historical and meaningful purpose of the Great Writ. The record demonstrates with unmistakable clarity that there is no unconstitutional deprivation of liberty. Any benefit achieved is available through other means, at much less cost. Without any real remedial impact and without any real

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[19] See *Barrow v. State*, 239 Ga. 162, 236 S.E.2d 257 (1977); *State v. Plenty Horse*, 85 S.D. 401, 184 N.W.2d 654 (1971); *State v. Silva*, 259 So. 2d 153 (Fla. 1972).

[20] 11 U.L.A. § 485 (1966).

[21] See Ga. Code Ann. § 50-105—50-127 (1967), N.C. Gen. Stat. n. 8, § 15-217—15-222 (1959), Wis. Stats. § 974.06 (1969). Partially as a response to particular criticism of the protection of rights in state courts in the south, Tennessee has passed its own detailed Post Conviction Review Act, Tenn. Code Ann. § 40-3801 et seq. (1967), providing for review of any claim of incarceration contrary to the state or federal constitutions. See Eades, Appellant and Post Conviction Relief in Tennessee, 5 Memp. State L. Rev. (1974). The Tennessee courts have further not hesitated to strike down grand juries where a prima facie case of discrimination has been shown. See *Bonds v. State*, 220 Tenn. 555, 421 S.W.2d 87 (1966); *State v. Jefferson*, 529 S.W.2d 654, 680 (Tenn. 1975); *Kennedy v. State*, 186 Tenn. 310, 210 S.W.2d 132 (1946) *cert. denied* 333 U.S. 846 (expressly approved in *Tollett v. Henderson*, 411 U.S. 258, 277 (Marshall, J. dissenting).

question of possible innocence, the issuance of the writ of habeas corpus in this case becomes a hollow victory with no celebrants. The Great Writ should not be employed when neither the personal nor societial benefits can be identified.

## II

**The Sixth Circuit's Decision Does Not Comport With the Clearly Erroneous Standard and Is Contrary to Decisions of This Court Regarding the Equal Protection Clause.**

Tennessee uses the key man system of jury selection. Three jury commissioners are appointed by the trial judge in each county. Following statutory guidelines, these commissioners compile a jury pool from which both grand and petit juries are randomly drawn. *See* Tenn. Code Ann. § 22-223-243 and Tenn. Code Ann. § 40-1501-1505. The grand jury foreman or forewoman[22] is selected in a different manner. The criminal court judge appoints the foreman for a term of two years. The foreman may be chosen from the general population and otherwise qualified to serve on the grand jury. *See* Tenn. Code Ann. §§ 40-1506, 1507. The foreman becomes the thirteenth grand juror and is required by law to sign all true bills. Tenn. Code Ann. § 40-1506, 1706.[23]

The United States Constitution does not guarantee to a state defendant the right to a grand jury. *Hurtado v. California*, 110 U.S. 516 (1884). However, this Court has long held that a criminal defendant is denied equal protection of the law if, as a result of purposeful discrimination, members of his own

[22] Hereinafter, only the masculine designation will be used. The statute uses both.

[23] Tenn. Code Ann. § 40-1706 requires the concurrence of twelve grand jurors to return a true bill. Although the foreman must sign all true bills, his vote is not necessary to indict.



race are excluded from grand jury service. *Strauder v. West Virginia*, 100 U.S. 303, 309 (1880). The early cases involved absolute exclusion but today the principle is established that substantial under-representation constitutes a constitutional violation, if the cause is purposeful discrimination. *Castaneda*, 97 S.Ct. at 1279; *Turner v. Fouche*, 396 U.S. 346, 359 (1970).

A criminal defendant, in order to prove an equal protection violation in the context of grand jury selection, must first establish that the excluded group is a distinct class, singled out for different treatment under the laws. Next the defendant must prove the degree of under-representation. Finally the defendant must show that the selection procedure is susceptible to abuse. *Castaneda*, 97 S.Ct. at 1280; *Alexander v. Louisiana*, 404 U.S. 625, 630, 632 (1972); *Akins v. Texas*, 325 U.S. 398, 403-404 (1945). If substantial under-representation is demonstrated and the other requirements shown, then a prima facie case is made and the burden shifts to the state to rebut the case. *Castaneda*, 97 S.Ct. at 1279; *Alexander*, 405 U.S. at 632; *See also, Whitus v. Georgia*, 385 U.S. 545 (1967).

The method of proving an equal protection violation in the context of grand jury selection is sometimes called the "rule of exclusion." This method of proof may give rise to a presumption of unconstitutional action which will prevail if unrebutted. *Washington v. Davis*, 426 U.S. 229, 241 (1976). However, the essential element of inviduous discriminatory purpose is still required. "The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race." *Washington*, 426 U.S. at 239. A prima facie case fails when the presumption is dispelled by plausible evidence demonstrating the official action was not racially motivated. *Castaneda*, 97 S.Ct. at 1282; *Turner*, 396 U.S. at 361.

There can be no doubt that a Court of Appeals may set aside a district court's findings in a habeas action only if they are

clearly erroneous. Fed. Rule Civ. Proc. 52(a), 81(a)(2); *Castaneda v. Partida*, 430 U.S. 482, 97 S. Ct. 1272, 1286 (1977) (Stewart, J. dissenting). The district court below dismissed the foreman selection issue, finding "that the foreman was selected for other than racial reasons. . . ." and "that this issue had been adequately investigated by the state trial judge and his determination that there had been no racial discrimination was correct."[24] These findings can not be said to be clearly erroneous.

Certainly, black people are a distinct class satisfying the first element of proof. Further, the Tennessee system, which allows the criminal judge to exercise his discretion in selecting a foreman, could be used to discriminate. Therefore, in order to make a prima facie case the respondents were required only to demonstrate substantial under-representation over a significant period of time. The proof on this element is very questionable[25] but was sufficient for the district judge to find a prima

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[24] The district judge also based his decision on *Stone v. Powell*, 428 U.S. 465 (1976), as is discussed above. Although not cited in his memoranda, the district judge's decision is also a correct application of 28 U.S.C. 2254(d).

[25] The opinion of the Sixth Circuit is very misleading on a number of points relating to the evidence adduced by respondents, the rebuttal evidence, and the procedure below:

(a) First, there was no hearing of any kind in district court in this case. All references in the opinion to a "hearing" are to the hearing in state court on the plea in abatement. The transcript of this hearing was before the federal courts.

(b) Second, the opinion states "There has never been a black foreman or forewoman in Tipton County according to the recollections of the trial judge, three jury commissioners, and three former foremen". In fact, the record shows that the three jury commissioners never testified on this issue whatsoever, and the trial judge's affidavit does speak to his recollection but only to the present. *See*, state record, Vol. I, pp. 55-71). Therefore, the total evidence of substantial underrepresentation is drawn from the testimony of three foremen. One had only served for two years in the early seventies. One served



facie case. The state responded with two affidavits, from the acting foreman and the trial judge. These affidavits demonstate with frankness and clarity the solely pragmatic reasons why the foreman was selected. Simply stated, the regular foreman was unavailable so the judge chose a former foreman because of his availability, his willingness, his experience, and his demonstrated ability. The reasons for selection are very credible and demonstrate a responsible and natural course of human action which is wholly void of racial consideration. The district court so found and this finding can not be said to be clearly erroneous.

The decision of the Sixth Circuit is contrary to a long, unbroken line of decisions by this Court requiring proof of intentional discrimination to sustain an equal protection claim. *See Castaneda*, 97 S. Ct. at 1279; *Washington*, 426 U.S. at 239; *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977); *Turner*, 396 U.S. at 361; and *Carter v. Jury Commissioners*, 396 U.S. at 339. Analogous to the facts in *Carter*, the proof here only shows that the post of foreman has not been held by a black according to the recollection of three foremen. Unlike *Carter*, the facts here also show a plausible, credible, non-racially motivated reason for the selection in issue. This reason is different from the general, self-serving explanations rejected by this Court in *Turner*. The reason here is pragmatic and supported by facts admitted by both sides. The rejection of this reason establishes a standard which can only be met by random selection or historical proportional representation. This is contrary to the decisions of this Court. *See especially*, *Carter*, 396 U.S. at 339.

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"5 or 6 years" in the early sixties. The third served "several years" in the fifties. Two of them had also substituted. These recollections form the whole proof of underrepresentation. (*See*, state record, Vol. I, pp. 71-82).

The Sixth Circuit decision has in effect extrapolated from the doctrine that "a person intends the natural consequences of his acts". See *Rabinowitz v. United States*, 366 F.2d 34 (5th Cir. 1966). Such a rule may aptly be applied to a situation such as *Rabinowitz* or other cases where the validity of a system is at issue. There a drastic statistical disparity is only plausibly explained by either invalid procedure or intentional discrimination. Thus, historical statistics are valid criteria against which a system may be tested. However, history is not a valid criteria against which one man's motivations may be tested. The system of selection for foremen in Tennessee is essentially—the discretion of one man. When the system is such, then history is irrelevant. Only the individual's motivation and maybe his personal history are valid in assessing his intent. Given these considerations, the prima facie case here built on historical statistics is virtually meaningless. However, the clear and convincing pragmatic motivation set out in the affidavit of the trial judge is most meaningful. The district court accepted these motivations and refused to find discriminatory intent. The district court's finding is not clearly erroneous.

## III

**Error, if Any, Was Harmless Beyond a Reasonable Doubt.**

Assuming, without conceding, error in the selection of the acting foreman and that the issue is cognizable on federal habeas corpus, the error was harmless beyond a reasonable doubt. *Harrington v. California*, 395 U.S. 250 (1969); *Chapman v. California*, 386 U.S. 18 (1967).

The perceived error involves the selection of the acting foreman. The foreman did not vote for indictment, and his only involvement was to call one witness, swear in the witness, ask the grand jury if they were ready to vote, and sign the indictment. If error, this is a now moot procedural error which had no effect on the integrity of the trial. Ironically, a *Bruton*[26] type error in this case has been declared harmless by all reviewing courts. *Bruton* errors certainly have the potential of affecting the reliability of the fact finding process. The foreman selection error, if any, had no such potential. *See also Brown v. United States*, 411 U.S. 223 (1975).



## CONCLUSION

"Our goals are truth and justice, and procedures are but means to these ends. Truth and justice are ultimate values, so understood by our people, and the law and the legal profession will not be worthy of public respect and loyalty if we allow our attention to be diverted from these goals." Oaks, "Ethics, Morality, and Professional Responsibility," 3 B.Y.U.L. Rev. 591, 596 (1975). For these values, and for the other reasons explained in this brief we respectfully pray that the judgment of the Court of Appeals be reversed and that the petitions for the writ of habeas corpus be dismissed.

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[26] *Bruton v. United States*, 391 U.S. 123 (1968).

DEC 20 1978

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1701

JIM ROSE, WARDEN,

*Petitioner*

v.

JAMES E. MITCHELL and
JAMES NICHOLS, JR.,

*Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

## BRIEF FOR RESPONDENTS

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1701

JIM ROSE, WARDEN,

*Petitioner*

v.

JAMES E. MITCHELL and
JAMES NICHOLS, JR.,

*Respondents*

## BRIEF FOR RESPONDENTS

### OPINIONS BELOW

The opinion of the Court of Appeals (A. 127-141) is reported at 570 F.2d 129. The opinion and orders of the District Court (A. 98-99, 106-107, 121-122, 124-126) are not reported.

### JURISDICTION

The judgment of the Court of Appeals was entered on January 9, 1978. Petition to rehear was filed by the State (A. 142-150) and was denied on March 30, 1978. (A. 151). The petition for a writ of certiorari was timely filed within ninety (90) days of that date, and granted by this Court on October 2, 1978. *Rose* v.

*Mitchell*, U.S. , 99 S.Ct. 76 (1978). Jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED

The United States Court of Appeals for the Sixth Circuit has ordered issued a writ of habeas corpus because the State murder indictment of the two (2) respondents was void in that the foreman of the State Grand Jury that indicted them was chosen in a manner violative of the Fourteenth Amendment.

The questions presented are:

1. Whether the foreman of the Grand Jury that indicted respondents was selected in a racially discriminatory manner violative of the Fourteenth Amendment.

2. Whether the State conviction of the respondents must be set aside if the foreman of the Grand Jury that indicted the respondents was selected in a racially discriminatory manner violative of the Fourteenth Amendment.

3. Whether federal habeas corpus relief is available to the respondents to challenge the validity of their conviction when they allege that the foreman of the Grand Jury that indicted them was chosen in a racially discriminatory manner violative of the Fourteenth Amendment.



## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article 1, Section 14 of the Tennessee Constitution provides:

> Prerequisites to criminal charge.—That no person shall be put to answer any criminal charge but by presentment, indictment or impeachment.

United States Code, Title 18, Section 243 states:

> Exclusion of jurors on account of race or color. No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude; and whoever, being an officer or other person charged with any duty in the selection or summoning of jurors, excludes or fails to summon any citizen for such cause, shall be fined not more than $5,000.

## STATEMENT OF THE CASE

The respondent Mitchell and Nichols and two (2) codefendants were indicted on November 6, 1972, for two (2) counts of first degree murder by the Tipton County, Tennessee, Grand Jury. On March 22, 1973, the respondents were found guilty after a jury trial of the murders and given two (2) sixty (60) year sentences to run consecutively. (Order of Circuit Court of Tipton County, Tennessee, March 22, 1973).

Prior to the trial, the respondents, on February 8, 1973, filed a written *pro se* pretrail motion in the nature of a plea in abatement in which they asked the Court to dismiss the indictment for, in part:

> The array of the grand jury of Tipton County, was not selected, drawn or summoned in accordance with the law and is not representative of the community from which it was impanelled because of systematic exclusion of Negroes, other minorities and people of lower income, especially in regards to the position of the foreman, of said grand jury.

(A. 1-2). The respondents are both black men.

On March 13, 1973, an evidentiary hearing was held in order to dispose of the pretrial motions including the motion raising the constitutionality of the selection of the grand jury and its foreman. The respondents at this hearing were represented by their court-appointed attorneys who had not made or drafted the plea in abatement. It is not clear on the record why the respondents had to file their own *pro se* pretrail motion and plea in abatement, but from a reading of the transcript on the plea of abatement hearing, it is clear that the record made by the respondents' court-appointed attorneys could have dealt more extensively with the issue of discrimination in the selection of the grand jury. For instance, there is no indication in the record of the total number of persons on the master jury list, nor is there any indication of the racial percentage breakdown of the master jury list. The



State Court hearing does, however, provide a great deal of relevant information, especially as to the selection of the grand jury foreman.

As related to the grand jury and grand jury foreman issue, a number of witnesses were called. (A. 3-36). The first witness was Mr. William Simonton, Jr., who was one of the jury commissioners. Mr. Simonton testified that the master jury list from which the grand jury was selected was chosen by the three (3) jury commissioners from a telephone directory supplied by the telephone company.[1] He testified that they had used this method for the first time two (2) years ago (1970), and that the jury list in use in November, 1972, was still the same one that had first been selected from the phone book two (2) years prior. (A. 8).

Mr. Simonton next explained the selection process for the master jury list.

> A. Well, we take the telephone book and we go down the list and we see the name of someone that we know, either in person or their reputation, to be of good character and we take that name and put it on the card.
>
> Q. And how do you go about establishing this good reputation?

---

[1] Respondent is providing the Court with some facts from the record regarding the selection of the grand jury itself so that the Court will better understand the total circumstances of this case.

A. By reputation. Our commissioners are from three distinct areas of the county and, among the three of us, we're pretty well suppose to know, either personally or by reputation people throughout the county.

. . . .

Q. In merely asking you this, Mr. Simonton: How do you insure that you will have a proper proportionate or a proper ratio of black members on this jury panel? That's really my question.

A. Well, we seek out the names of black citizens whom we know.

Q. Black citizens that you what?

A. Whom we know, either personally or by reputation.

Q. And you don't make any effort to pick any black members that you don't know or white members that you don't know?

A. Black or white, either; no sir.

Q. So you depend on knowing these people, then; your knowledge of these people?

A. Either personally, or by reputation; yes, sir. If it's just a name to us, we have to pass it up because we don't know them.

(A. 9-10). Mr. Simonton further testified that he believed that Tipton County had a population of 30 percent black. (A. 11). The other two (2) jury commissioners, Mr. William Bibb and Mr. W.F. Davis, were called but their testimony was cumulative to that of Mr. Simonton. (A. 12-17). Mr. Bibb did state that the Jury Commissioners are selected by the Trial Judge for a period of four (4) years. (A-12).



The next witnesses who were called were three (3) former foreman of the Tipton County Grand Jury. They all agreed that they had never known there to be a black grand jury foreman. Mr. Frank McBride stated that he had been grand jury foreman several times over the last twelve (12) years and he was then asked if he had "ever known of any foreman that was a black man." He stated that he had never known of a black being foreman. (A. 17-18). Mr. Peyton Smith testified that he had been foreman on several occasions going back "in the early '50's" and he was obviously acquainted with the workings of the Court. He had never known there to be a black grand jury foreman. (A. 20). See also testimony of former foreman Naifeh. (A. 25).

Mr. Peyton J. Smith also testified that he was the foreman for the November, 1972, grand jury that indicted the respondents. He testified that he was personally selected by the Trial Judge to serve for the November Term of Court. (A. 21). He recalled that one (1) black served on the November, 1972, Grand Jury. (A. 21). All the former foremen recalled there being one (1) or more blacks on prior grand juries, but never more than three (3).

Several other grand jurors were called to testify as to how many blacks were on the November, 1972, Grand Jury, and it was concluded that only one (1) grand juror had been black. (A. 30). The members of the Grand Jury, including the black member, testified that the race of the respondents was not mentioned in their deliberations and played no part in their decision. (A. 26-35).

After hearing the evidence on the selection of the Grand Jury and the foreman, the Trial Judge stated his ruling: "plea in abatement will be denied." (A. 35). The Trial Judge made no written or oral findings of fact or law, and did not state his reason or reasons for his ruling. He was later to enter a written order dated March 13, 1973. That order stated in full: "plea in abatement is overruled." (A. 36).

On appeal to the Court of Criminal Appeals of Tennessee, by decision dated June 5, 1974, the conviction of the respondents was upheld. As stated by the Court of Criminal Appeals:

> The third assignment states that it was error not to sustain the plea in abatement to the indictment because the proof showed that no negro had ever served as foreman on the grand jury, and that the eligible grand jurors were selected from the telephone directory.

This assignment was overruled by the Court of Criminal Appeals on the grounds that racial discrimination had not been proved in either the selection of the



grand jury or the foreman. (A. 38-39). Certiorari was denied as to all assignments of error by order of the Tennessee Supreme Court dated March 10, 1975. (A. 42). The respondents have exhausted their state remedies.

On May 16, 1975, respondent Mitchell filed a *pro se* petition for writ of habeas corpus in the United States District Court for the Western District of Tennessee (case No. 75-222). (A. 43-52). On June 11, 1975, respondent Nichols also filed a *pro se* petition (case No. 75-265). (A. 62-73). Although somewhat inarticulately stated, both respondents set out the issue of the improper selection of the grand jury and its foreman. (A. 47, 49, 67, and 70).

On August 6, 1975, the District Court referred this case to the United States Magistrate for his recommendations. (A. 83). On January 28, 1976, the Magistrate filed a sixteen (16) page report on Reference. (A. 84-97). He concluded that most of the claims made by the respondents were either without merit or could not be raised by federal habeas corpus. After a review of the facts, he did, however, conclude that the claims as to the selection of the grand jury, trial jury, and grand jury foreman did have merit, and that an evidentiary hearing should be held. (A. 90-91). The District Court, however, never held an evidentiary hearing.

On February 17, 1976, the District Court entered an order which agreed with the Magistrate's recom-

mendations as to the respondents' claims, except that the Court disagreed that an evidentiary hearing was necessary on the grand jury selection issue and determined that the State Courts had correctly decided the issue. The District Court did state that there was a prima facie case of discrimination shown with respect to the selection of the grand jury foreman and allowed the State additional time to file additional evidence. (A. 98-99). After receiving a response from the State, the District Court entered another order on April 6, 1976, in which it noted that the State had filed an affidavit of the grand jury foreman which stated that the foreman did not vote on the indictment of the respondents, but the Court indicated that it was still waiting to determine if the selected grand jury foreman were part of the regular jury venire when he was appointed foreman. (A. 106-107).

On April 14, 1976, the State filed with the Court an affidavit of the State Trial Judge. (A. 112-113). The State Trial Judge indicated that the foreman of the Tipton County November, 1972, Grand Jury, Mr. Peyton Smith, was personally selected by the Trial Judge as the prior foreman was going to be out of the county during the November, 1972, Term. Mr. Smith had served as foreman on prior occasions, and Mr. Smith was not a member of the regular jury panel or venire. As to racial discrimination, the Trial Judge stated:

> In my five counties, I do not have a black grand jury foreman, although I have a black member of my Jury Commission in one county. Most all of



> my Grand Juries and Petit Juries have sizeable numbers of blacks on them, both men and women. I don't appoint Grand Jury Foreman very often because when their two year term expires, I usually reappoint them, thus they serve a long time and the problem doesn't come up very often. I don't think that I have really given any thought to appointing a black foreman but I have no feeling against doing so.

(A. 113).

On February 17, 1977, the District Court disposed of the question of both the selection of the grand jury and the foreman by concluding that no racial discrimination in the composition of the grand jury had been shown and that the grand jury foreman was selected for other than racial reasons and that the foreman did not vote on the indictment of the respondents. (A. 121-122). The case was dismissed. (A. 123-124).

After the order of dismissal, the respondents, through counsel,[2] filed a motion to reconsider and for an evidentiary hearing. By order dated March 23, 1977, the Court denied this motion and cited as a further reason for its prior dismissal the application of *Stone* v. *Powell*, 428 U.S. 465 (1976), in that *Stone* precluded collateral attacks on State Court convictions. (A. 124).

---

[2] Up to that point in the proceeding before the District Court, the respondents had not been represented by counsel. Thereafter, respondents were represented by a legal aid attorney.

Believing that the District Court erred in several respects, the respondents sought review in the Court of Appeals and the District Court granted the certificate of probable cause. (A. 126).

On January 9, 1978, the Court of Appeals ruled in favor of the respondents and set aside their convictions for murder. The Court determined that the grand jury foreman of the grand jury that indicted the respondents had been chosen in a manner violative of the Fourteenth Amendment and that since the Constitution prohibited the way in which the indictment was obtained, their convictions could not stand.

During the habeas corpus proceeding in the District Court and on appeal to the United States Court of Appeals for the Sixth Circuit, there was an issue of whether or not constitutional standards had been violated in the selection of the grand jury itself. The Court of Appeals, because of its decision as to the foreman, found it unnecessary to reach this issue, but indicated that if it had addressed this issue, the case would probably have to be remanded for a further evidentiary hearing in the District Court. *Mitchell* v. *Rose*, 570 F.2d 129. 132-134 (6th Cir. 1978).

On January 25, 1978, the State filed a petition to rehear and seriously asserted for the first time that *Stone* v. *Powell*, 428 U.S. 465 (1976), should be applied to this case so as to preclude federal habeas corpus jurisdiction. This petition was summarily denied by order of the Court of Appeals on March 30, 1978. (A.



151). The Court of Appeals subsequently stayed its mandate until completion of the proceeding in this Court. The respondents are now in the custody of the state of Tennessee at Brushy Mountain Penitentiary in Petros, Tennessee.

## SUMMARY OF ARGUMENT

The case involves the constitutionality of the process by which the foreman of the Tipton County, Tennessee, Grand Jury was selected. Simply stated, it is the position of the respondents, as it was the position of the United States Court of Appeals for the Sixth Circuit, that the respondents made a prima facie case of discrimination in the selection of the foreman, and the State was not able to rebut that prima facie case. Therefore, the respondents were granted the relief to which they were entitled. Respondents ask this Court to affirm the decision of the Court of Appeals for the Sixth Circuit.

The State makes much of the fact that the respondents were guilty of a violent crime and it couches some of its argument in emotional terms, interwoven with the facts of the crime. The facts of the crime, however, are not relevant. Whether the crime be burglary or murder, this Court has continually held that discriminatory selection of grand juries will not be tolerated. The unconstitutional selection of the grand jury foreman taints the entire proceeding because a grand jury that is part unconstitutional cannot return

a proper indictment. Stated another way, a grand jury that is "twelve-thirteenths constitutional" still cannot render valid indictments. *Hale* v. *Henderson*, 336 F.Supp. 512, 516 (W.D. Tenn. 1972).

The facts relevant to this case are those surrounding the selection of the grand jury foreman, and the focus of this case should remain on those facts. The decision in the Court of Appeals was mandated because there had never been a black grand jury foreman within the memory of persons who testified in the State proceeding; and the State, in its attempt to rebut the prima facie case, produced nothing except the affidavit of the State Trial Judge that he did not have anything against appointing a black, but he had just never thought of it. The case for relief is clear when the facts are judged in light of the prior decisions of this Court. See *Castaneda* v. *Partida*, 430 U.S. 482 (1977).

The State contends that the fact that the foreman did not vote on the indictment means that there could be no actual prejudice to respondents so that no relief should be granted even if the foreman were improperly selected. This contention, however, is not supported by the law. The decision of the Court of Appeals is supported by the rationales of presumed prejudice and judicial integrity. The powerful leadership position of the grand jury foreman makes necessary the application of the longstanding doctrine of presumed prejudice, which has always been applied in jury discrimination cases. As an integral part of the



grand jury, the foreman is in a position to guide and control, whether properly or improperly, the decision-making process of the grand jury. In addition to presumed prejudice, the decision of the Court of Appeals is also supported by the doctrine of judicial integrity. When the Constitution prohibits the procedure by which the indictment was obtained, the courts must void the indictment. *Peters* v. *Kiff*, 407 U.S. 493 , 498 (1972).

The State also contends that *Stone* v. *Powell*, 428 U.S. 465 (1976), precludes federal habeas jurisdiction of a case raising discrimination in the selection of the grand jury. This argument is conceptually unsound and legally invalid for a number of reasons. *Stone* involved only the Fourth Amendment and the exclusionary rule and was expressly limited to Fourth Amendment claims. This case, however, involves the Fourteenth Amendment. *Stone* also applies only to cases in which there has been a full and fair hearing in State Court. There was no full and fair hearing here: the State Court judge made no findings of fact or conclusions of law; and the State Court judge who presided at the hearing was the same person who had chosen the grand jury foreman and whose conduct was at issue.

Furthermore, the rationales used in Fourth Amendment exclusionary rule cases are inapplicable in grand jury discrimination cases. The remedy of voiding indictments in grand jury discrimination cases is based upon presumed prejudice, judicial integrity, and, per-

haps, deterrence. In contrast, presumed prejudice, and judicial integrity do not support the exclusionary rule in Fourth Amendment cases.

The considerations of federalism in Fourth Amendment exclusionary rule cases are also different from those in Fourteenth Amendment jury discrimination cases. Whereas in exclusionary rule cases, this Court enforces a rule not imposed on the reluctant States until less than twenty (20) years ago, in grand jury discrimination cases, this Court enforces the congressional command of 18 U.S.C. § 243, and the intent of the States themselves, as expressed in the Fourteenth Amendment. The federal courts have long been the protectors of the rights of black citizens in this country, and it would reverse one hundred ten (110) years of history if this Court were to decide that the jury discrimination claims of black citizens could not be raised in a federal court. See R. Kluger, Simple Justice (1975).

This Court in *Brown* v. *Allen*, 344 U.S. 443 (1953), found claims of state prisoners alleging discrimination in the selection of grand juries to be cognizable in federal habeas corpus cases. Nothing in this case requires deviation from the mandate of *Brown* v. *Allen*.



## ARGUMENT

### I. THE FOREMAN OF THE GRAND JURY THAT INDICTED RESPONDENTS WAS SELECTED IN A RACIALLY DISCRIMINATORY MANNER VIOLATIVE OF THE FOURTEENTH AMENDMENT.

The position of foreman or forewomen of the Grand Jury is one of great importance in the Tennessee Grand Jury system.[3] In *Hale* v. *Henderson*, 485 F.2d 266 (6th Cir. 1973), the United States Court Appeals for the Sixth Circuit stated that:

> Petitioner also points out that the grand jury foreman has important statutory duties in Tennessee, T.C.A. 40-1510, 40-1622 (1955), and exercises a leadership role, as well as casting a vote in the grand jury.

*Id.* at 270.

As noted by the Federal Magistrate in his first Report on Reference in this case, the grand jury foreman or forewomen in Tennessee, under the provisions of T.C.A. § 40-1506, "sits as the thirteenth member of the grand jury." Since T.C.A. § 40-1706 provides that

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[3] Tennessee is one of the States that still requires a grand jury indictment to initiate felony charges. Tenn. Const. art. 1, § 14. It appears that twenty-five (25) States and the federal government have the constitutional requirement of grand juries for the initiation of some or most serious criminal charges. Van Dyke, Jury Selection Procedures (Appendix B: Grand Juries) 263-70 (1970); Van Dyke, *The Grand Jury: Representative or Elite*, 28 Hastings L.J. 37, 63-71 (1976).

"at least twelve grand jurors" must concur before an indictment can be returned, the foreman's or forewoman's vote can be the twelfth in returning the indictment. (A. 87). More important, even though the foreman or forewoman may not always vote, he or she must sign the indictment. T.C.A. § 40-1706. The indictment is void if not signed by the foreman or forewoman. *Bird* v. *State*, 103 Tenn. 343, 52 S.W. 1076 (1899). In Tennessee there must always be a foreman or forewoman in the finding of an indictment. *State* v. *Collins*, 65 Tenn. 151, 153 (1875). While the State may argue that the foreman in this case did not vote, the fact remains that the indictment is not valid under Tennessee law unless the foreman or forewoman signs the indictment.

The grand jurors themselves are selected by random draw from the preselected jury panel or venire. T.C.A. § 40-1501. The jury list itself is chosen by the jury commissioners every two (2) years. See T.C.A. § 22-223 to 22-242.[4] The grand jury foreman or forewoman is chosen in a completely different manner. In essence, the grand jury foreman or forewoman is hand picked by the criminal court judge. T.C.A. § 40-1506. In addition, as in the instant case, the grand jury

[4] For a good general discussion of Tennessee jury selection procedures for the grand jury, petit jury, and grand jury foreman or forewoman, see LeClercq, *The Tennessee Court System*, 8 Mem. St. L.Rev. 185, 489-99 (1978).



foreman or forewoman need not be a member of the jury panel or of the grand jury. T.C.A. § 40-1507.[5]

T.C.A. § 40-1510 sets out the statutory duties of the grand jury foreman or forewoman. He or she must assist the District Attorney in ferreting out crime. Out of term he or she must advise the District Attorney with respect to law violations and provide him names of witnesses who may be summoned before the next term of the grand jury. In term, the foreman or forewoman may order the issuance of subpoenas for witnesses to go before the grand jury, unless directed otherwise by the District Attorney. Thus, it can readily be seen that the foreman or forewoman in Tennessee has important statutory duties as to the day-to-day operation of the grand jury as well as to the validity of the indictments returned. The grand jury speaks through its foreman or forewoman. See Holdsworth, History of English Law, Vol. I, at 314 (1956). The grand jury foreman or forewoman is the "presiding officer" of the grand jury. *State* v. *Collins*, *supra* at 153. See *State* v. *Gouge*, 80 Tenn. 132, 135 (1883).[6]

[5] This procedure of choosing the grand jury foreman or forewoman from the population at large is atypical. Most jurisdictions require the foreman to be selected from the grand jury itself. See, e.g., Fed. R. Crim. P. 6(c); Miss. Code Ann. § 13-5-45. Other states provide for the election of the foreman or forewoman by the grand jury itself from among its members. See, e.g., Ky. Rev. Stat. § 29A.250.

[6] The foreman's oath, found at T.C.A. § 40-1508, is much more extensive than the simple oath of the grand jurors at T.C.A. § 40-1509.

Since the circuit judge chooses the grand jury foreman or forewoman from the population at large with no standards other than the minimum qualifications set out in T.C.A. § 40-1507,[7] the potential for discrimination is great. The judge is likely to choose as foreman or forewoman someone whom he knows personnally or by reputation and thus avoid the time-consuming process of seeking qualified individuals and interviewing them or otherwise screening them. Of course, when the judge, as here, admits that "I don't think that I have really given any thought to appointing a black foreman," (A. 113), then one segment of the population is automatically removed from consideration.[8]

There is no doubt that the selection of the grand jury foreman or forewoman, just as the selection of the members of the grand jury, is subject to the requirements of the Fourteenth Amendment. If a black man is subject to indictment by the grand jury, then blacks cannot be systematically excluded in the selection process by which the foreman or forewoman is

[7] T.C.A. § 40-1507 requires the foreman or forewoman to be at least twenty-five (25) years old and to possess all the qualifications of other jurors.

[8] As to the duty to become familiar with persons eligible for jury service, see *Cassell* v. *Texas*, 339 U.S. 282, 287-90 (1950). As to the duty to refrain from following a course of conduct that naturally tends to exclude a certain group, see *Akins* v. *Texas*, 325 U.S. 559, 403-04 (1945).



selected. As was stated by the District Court for the Western District of Tennessee:

> If the [State] Court means to say that, if the twelve members of the grand jury other than the foreman were selected without systematic exclusion of Negroes, it would be constitutionally immaterial if Negroes were systematically excluded from the position of foreman, we cannot agree. We cannot agree because *Whitus* v. *Georgia*, *supra* [385 U.S. 545 (1967)] *does not indicate that a grand jury that is twelve-thirteenths constitutional can render valid indictments* (emphasis added).

*Hale* v. *Henderson*, 336 F. Supp. 512, 516 (W.D. Tenn. 1972).

*Hale* v. *Henderson* involved a challenge to the selection process of the grand jury foreman in Shelby County, Tennessee, in that it was alleged that racial discrimination was present in the selection process. When the *Hale* case finally came to be heard on the question of the selective discrimination of the grand jury foreman, Judge Mac Swinford was sitting by special designation in the Western District of Tennessee. Judge Swinford indicated that if the petitioner therein had shown that the grand jury foreman had been chosen from outside the body of the jury venire, his claim would have been "well taken" as there had been a long history of complete exclusion of blacks from the position of grand jury foreman. In the case then before the District Court, the foreman was a

foreman pro tempore who had been chosen from among the members of that grand jury. The petitioners had not challenged the legality of the selection of the jury venire or the grand jury itself, so the Court said that it must reach the conclusion "that the venire was selected in a manner that did not systematically exclude blacks." *Hale* v. *Henderson*, 349 F.Supp. 567, 568 (W.D. Tenn. 1972). Simply stated, Judge Swinford would have granted relief if the grand jury foreman in that case had been chosen from a source other than the grand jury. In this case, under facts almost identical to *Hale* v. *Henderson*, the grand jury foreman was chosen from a source other than the grand jury. The opinion of Judge Swinford leads the strongest possible support to the resondents' position.

Judge Swinford's opinion in *Hale* v. *Henderson* was affirmed by the Court of Appeals for the Sixth Circuit at 485 F.2d 266 (1973). In that Court, while concurring with Judge Edwards and Judge Miller in denying relief on the facts in the case, Judge Lambros indicated that he believed a prima facie case of discrimination had been made, regardless of whether the foreman pro tempore was selected from the jury venire or from the public at large, inasmuch as none of the past one hundred fifty (150) foremen or foreman pro tempore in Shelby County had been black. Judge Lambros noted that the criminal trial judge who appointed



the foremen and foremen pro tempore knew only a few blacks. He also stated that:

> It is difficult to imagine what more the majority would require to warrent a prima facie finding of discrimination except a confession on the part of the state judges that they were prejudiced against blacks and had intentionally avoided appointing them. . . .

*Hale* v. *Henderson*, 487 F.2d 266, 271 (1973).[9]

The case now before the Court is different from *Hale;* most importantly, the foreman selected by the Trial Judge was not a member of the grand jury or the venire. The foreman appointed by the Trial Judge was selected from the public at large under the provisions of T.C.A. § 40-1506.

Prior to the respondents' trial in the State Court, a hearing was held on the question of the systematic exclusion of blacks from the position of grand jury foreman. That testimony has been set forth in The Statement of The Case and, based on that testimony, the Court of Appeals concluded that "there had never been a black foreman or forewoman of a grand jury in Tipton County." *Mitchell* v. *Rose*, supra at 135.[10]

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[9] At least the State Trial Judge in *Hale* v. *Henderson* had considered the appointment of blacks to the position of foreman. 485 F.2d at 269-70. The State Trial Judge in this case had not.

[10] Beyond the proof in the record, it would stretch credibility to even suggest that a black person in West Tennessee would have been appointed foreman of a grand jury in this century prior to the advent of the "civil rights" movement. History

The Trial Judge and the person selecting the grand jury foreman under T.C.A. § 40-1506 stated as follows in his affidavit filed in this case: "*I don't think that I have really given any thought to appointing a black foreman* but I have no feeling against doing so." (Emphasis added). (A. 113). This statement shows a negligent and callous exclusion of blacks by the person designated by statute to appoint the grand jury foreman or forewoman. It is obvious that if the Trial Judge has never even "thought" of appointing a black foreman, then blacks have been excluded peremptorily by having never been considered for the position. This admission by the Trial Judge, standing alone, comes very close to being the kind of confession that Judge Lambros discussed in his concurring opinion (noted *supra*) in *Hale* v. *Henderson*, 485 F.2d 266, 271 (1973).

Considering the two (2) District Court opinions in *Hale* v. *Henderson*, the State of Tennessee can hardly argue that it has been "ambushed" by a "new" constitutional standard set forth by the Court of Appeals

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teaches us otherwise. J. Cartwright, The Triumph of Jim Crow: Tennessee Race Relations in the 1880's (1976); R. Hamburger. Our Portion of Hell (1973) (a personal history of the civil rights movement in Fayette County, Tennessee; Fayette County borders on Tipton County); 1891 Tenn. Pub. Acts, ch. 52, § 2 (blacks must sit separately in railroad passenger cars); 1901 Tenn. Pub. Acts, ch. 7, § 1 (interracial schools prohibited); 1905 Tenn. Pub. Acts, ch. 150, § 1 (blacks must sit separately on street cars). These acts are codified in T.C.A. § 49-3701, T.C.A. § 65-1314, and T.C.A. § 65-1707. See generally E. Warren, A Republic If You Can Keep It, 46-48 (1972).



in *Mitchell* v. *Rose*. Well before the State Court trial in this case in March, 1973, the Federal District Court in Memphis (thirty-five miles from Tipton County) had made it abundantly clear that this Court's decisions regarding discrimination in jury and grand jury selection applied with full force to the selection of grand jury foremen or forewomen. *Hale* v. *Henderson*, 336 F.Supp. 512 (decided January 27,1972). *Hale* v. *Henderson*, 349 F.Supp. 567 (decided October 4, 1972). The State, thus, cannot legitimately contend that the Judge did not know that he had a duty to select the foreman in a manner consistent with this Court's prior grand jury discrimination decisions. This is certainly an important consideration when considering the proper remedy. See *United States* v. *Peltier*, 422 U.S. 531, 538 (1975).

The kind of selection and appointment of a person as important as the grand jury foreman or forewoman in Tennessee placed in the hands of a person who has never given a "thought" to appointing blacks is the kind of selection process repeatedly condemned by this Court as violative of the Fourteenth Amendment.[11] See, e.g., *Castaneda* v. *Partida*, 430 U.S.482 (1977); Annot., *Jury Selection - Group Discrimination*,

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[11] It is also violative of 18 U.S.C. § 243. See Mr. Justice White's concurring opinion in *Peters* v. *Kiff*, 407 U.S. 493, 505-07 (1973).

33 L.Ed.2d 783 (1973).[12] To exclude blacks from consideration by never giving them a "thought" is clearly to always deny to anyone of the black race the position of grand jury foreman or forewoman.

The State's position in reference to the Judge's duty in selection of the foreman or forewoman ignores the affirmative duty that is placed on the selecting official. The Judge had an affirmative duty "not to pursue a course of conduct in the administration of [his] office which would operate to discriminate in the selection of jurors on racial grounds." *Hill* v. *Texas*, 316 U.S. 400, 404 (1942).

A showing that the percentage of blacks selected as foremen over a period of time (in this case 0 percent for as long as people could remember) varied significantly with the percentage of blacks living in Tipton County (32.4 percent according to the 1970 census)[13] and that the selection process is amenable to discrim-

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[12] See generally Gewin, Circuit Judge, *An Analysis of Jury Selection Decisions*, Appendix to *Foster* v. *Sparks*, 506 F.2d 805, 813-37 (5th Cir. 1975); Kuhn, *Jury Discrimination: The Next Phase*, 41 S.Cal. L.Rev. 234 (1968); Sperlich and Jaspovice, *Grand Juries, Grand Jurors and the Constitution*, 1 Hastings, Const. L.Q. 63 (1974). A good article that treats at length the Tennessee jury selection system as it relates to prior decisions of this Court is Daughtrey, *Cross-Sectionalism In Jury Selection Procedures after Tayor* v. *Louisiana*, 43 Tenn. L.Rev. 1 (1975). The author is a Judge on the Tennessee Court of Criminal Appeals. The author believes that Tennessee should no longer retain its "Key man" system of jury and grand jury selection.

[13] 1970 Census figures for Tipton County are attached in the appendix to this brief at pages 1-10.



inatory action (the statement of the State Trial Judge, A. 112-113) is thus sufficient to warrant a prima facie finding of discrimination. *Castaneda* v. *Partida, supra; Alexander* v. *Louisiana*, 405 U.S. 625 (1972).[14] In *Alexander* the Court in a unanimous opinion held that when there was proof of opportunity for discrimination coupled with a disproportionately low number of negroes throughout the selection process, discrimination is in fact proved, if the State cannot carry its burden of proof. See *Castaneda* v. *Partida, supra* at 512-13 (Powell, J., dissenting).

The respondents have made out a prima facie case of discrimination in the selection of the grand jury foreman that cannot be overcome merely by the self-serving statement of the Trial Judge that he had "no feeling against" appointing a black foreman. (A. 113). *Castaneda* v. *Partida, supra* at 499 n.19; *Aledxander* v. *Louisiana, supra* at 632 (1972). The State in this case has failed to overcome the respondents' prima

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[14] The State's citation to *Washington* v. *Davis*, 426 U.S. 229 (1976), and *Village of Arlington Heights* v. *Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977), as authority for the contention that discrimination must be proved by positive proof of intent is inapposite. This Court made clear in *Washington* v. *Davis* that statistical disparity and the shifting of the burden of proof after the showing of prima facie case was still the clear law in the area of grand jury selection. *Washington* v. *Davis, supra* at 239, 241. Again in *Arlington Heights*, this Court made clear its adherence to the traditional rules for jury selection cases. *Arlington Heights* v. *Metropolitan Housing Development Corp., supra* at 266 n.13. See *Castaneda* v. *Partida, supra* at 493-94.

facie case of discrimination in the selection of the grand jury foreman. The State has offered no proof that the Judge considered all segments of the population in Tipton County, no proof that the Judge used any rational critieria in selecting the grand jury foreman, no proof that the Judge interviewed prospective grand jury foremen or forewomen with a view to seleting a qualified person without regard to race, and no proof that there had ever been a black foreman or forewoman in Tipton County or that one had ever been considered. It has certainly not been suggested that there were no blacks in Tipton County qualified to serve. What the State did produce was the sentiment of the Judge who selected the foreman that while he had "no feeling against" appointing a black person, he had just never"really given any thought to appointing a black foreman." (A. 113).

As stated by the Court of Appeals:

> Thus a judge who "never really gave any thought to appointing a black is discriminating just as surely as were the jury commissioners who never selected blacks because their names were "never discussed, "*Norris* v. *Alabama*, 294 U.S. 587, 55 S.Ct. 679, 79 L.Ed. 1074 (1935), or because they didn't know any blacks, *Turner* v. *Fouche*, 396 U.S. 346, 90 S. Ct. 532, 24 L.Ed.2d 567 (1970). Officials who select grand jurors have a duty to learn who is qualified to fill the position of grand juror, and to consider qualified individuals from all segments of society. Failure to perform that duty, resulting in the exclusion of a qualified



> segment of society, is unconstitutional discrimination. *Turner, supra* 396 U.S. 345, 90 S.Ct. 532, 24 L.Ed.2d 567.

*Mitchell* v. *Rose, supra* at 135.[15]

Based on the reasoning above, it should be concluded that the respondents' rights under the Fourteenth Amendment have been violated by the discriminatory manner in which the grand jury foreman in Tipton County, Tennessee, was chosen. Since discrimination has been proven, it is necessary to determine the appropriate relief to remedy this discrimination.

## II. THE PROPER REMEDY IN THIS CASE IS TO SET ASIDE THE CONVICTIONS OF THE RESPONDENTS.

Since 1879, this Court, in protecting the Fourteenth Amendment rights of both black and white citizens of this country and in enforcing the strong congressional statement in 18 U.S.C. § 243, has set aside convictions

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[15] The State contends that the Court of Appeals somehow violated the clearly erroneous rule by reversing the District Court. It should be remembered that the District Court did not conduct an evidentiary hearing but based its findings on the State Court transcript and certain affidavits filed in the District Court. Therefore, the "clearly erroneous" rule would not apply. 5A Moore's Federal Practice § 52.03[1] at 2624 (1977). Furthermore, the Court of Appeals did not disagree with the District Court's findings of facts, but rather with the District Court's application of the facts to the law. Of course, the Court of Appeals is not bound by the District Court's conclusions of law or findings that combine both fact and law, when there is an error as to the law. 5A Moore's Federal Practice § 52.03[3], at 2662-64 (1977).

when it has found a grand jury[16] to have been discriminatorily chosen. See, e.g., *Castaneda* v. *Partida, supra; Peters* v. *Kiff, supra; Strauder* v. *West Virginia*, 100 U.S. 303 (1879). Since *Strauder*, this remedy has been considered proper, as the law will not allow a conviction to stand when the method by which it was obtained violated fundamental rights. The reason for voiding indictments, however, goes beyond the protection of the integrity of the judicial system and encompasses the proposition that the exclusion of a racial group from a grand jury will likely cause prejudice to a member of the excluded group.[17] Early on this Court stated:

> It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy.

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[16] The same constitutional principles apply to grand jury selection and petit jury selection. "Principles which forbid discrimination in the Selection of Petit Juries also govern the Selection of Grand Juries." *Pierre* v. *Louisiana*, 306 U.S. 354, 362 (1939). See *Alexander* v. *Louisiana*, 405 U.S 625, 626 n. 3 (1972).

[17] The State's argument that the harmless error rule of *Chapman* v. *California*, 386 U.S. 18 (1967), should be applied in this case is without foundation. In none of this Court's jury discrimination cases has the harmless error rule ever been "suggested," must less applied. See *Chapman* v. *California, supra* at 44 (Stuart, J., concurring). Certainly, every grand jury case decided since 1967, by implication, rejected the application of *Chapman* to grand jury discrimination cases. See, e.g., *Castaneda* v. *Partida, supra; Peters* v. *Kiff, supra.*



. . . .

> And how can it be maintained that compelling a colored man to submit to a trial for his life by a jury drawn from a panel from which the state has expressly excluded every man of his race, because of color alone, however, well qualified in other respects, is not a denial to him of equal legal protection.

*Strauder* v. *West Virginia*, 100 U.S. 303, 309 (1879). This Court's adherence to the rationale of persumed prejudice has extended until the present. *Peters* v. *Kiff, supra* at 509 (Burger, C.J., dissenting). See *Castaneda* v. *Partida, supra.*

Because of the difficulty in proving actual prejudices in certain situations that are inherently susceptible to prejudice, this Court has always been willing to accept a rule of presumed prejudice. See, e.g., *Parker* v. *Gladden*, 385 U.S. 363, 365 (1966); *Turner* v. *Louisiana*, 379 U.S. 466, 473 (1965). Overt discrimination is often difficult to prove and, in the situation of a grand jury proceeding where subtle discrimination can easily be exercised, it is asking too much to expect the grand jurors or foremen or forewomen to confess their prejudice in open court. Human experience teaches us not to expect otherwise, and, as stated in *Turner* v. *Louisiana*, it would be "blinking reality" not to recognize the potential for prejudice.

In this case, even though the grand jury foreman did not vote on the indictment, the likelihood of sub-

stantial prejudice still inhered in the proceedings. The foreman or forewoman is part of the thirteen (13) person grand jury; he or she is the spokesperson for the grand jury; there is no indictment without the signature of the foreman or forewoman; and the foreman or forewoman is the leader, handpicked by the Trial Judge.[18] Like every other leader of a group, the foreman or forewoman is in a position to guide, whether properly or improperly, the decisionmaking process of the body.[19]

The Court of Appeals in this case summed up the rationale as follows:

> It seems clear that the potential for prejudice, given the position of authority and influence the foreman or forewoman holds, is considerable, and in such cases where the fact of prejudice may be impossible to prove, yet its effect could be so insidious and far-reaching, the courts have refused to require proof of prejudice before granting relief.

[18] The Tennessee Courts have recognized that a person present in the Grand Jury Room not even in a leadership position might have great influence over the grand jury. In discussing the presence of an unqualified and nonvoting person present in the grand jury room, the Tennessee Supreme Court stated "he could also have much influence upon the others by reasoning and arguing the matter of inquiry with the others." *State* v. *Duncan*, 15 Tenn. 271 (1834).

[19] See generally Bass, Leadership, Psychology and Organizational Behavior (1960); Shaw, Group Dynamics: The Psychology of Small Group Behavior 262-83 (1976).



*Mitchell* v. *Rose, supra* at 136.[20]

In determining the potential prejudice in this case, it should also be kept in mind that the respondents have made a substantial showing that the grand jury itself was chosen in an impermissible manner. See *Mitchell* v. *Rose, supra* at 132-34. This increases the chances of prejudice and the opportunity for the foreman and forewoman to exercise improper influence on a grand jury which is itself suspect.

It is not the potential for prejudice alone that mandates the correctness of the opinion below. In fact, relief has been granted by this Court to a white defendant who was indicted by a grand jury from which blacks had been improperly excluded. *Peters* v. *Kiff, supra.* This relief is mandated as a vindication for the rights of those improperly excluded and because "illegal and unconstitutional jury selection procedures cast doubt on the integrity of the whole judicial process" and thus deprive a criminal defendant due pro-

[20] While Judge John Peck wrote the decision of the Court of Appeals, the other two members of the panel were Chief Judge Harry Phillips and Senior District Judge Frank Gray sitting by designation (Judge Gray is now deceased). Judge Phillips is and Judge Gray was life-long residents of Tennessee, practiced law in Tennessee, and were both deeply involved in government and judicial service in Tennessee. See History of the Sixth Circuit, A Bicentennial Project 138-39, 180-81 (1977).

cess of law. *Peters* v. *Kiff, supra* at 498. As this Court has said:

> reversible error does not depend on a showing of prejudice in an individual case. The evil lies in the admitted exclusion of an eligible class or group in the community in disregard of the prescribed standards of jury selection.

*Ballard* v. *United States*, 329 U.S. 187, 195 (1946).

> where, as in this case, timely objection has laid bare a discrimination in the selection of grand jurors. The conviction cannot stand, because the Constitution prohibits the procedure by which it was obtained. Equal protection of the laws is something more than an abstract right. It is a command which the State must respect. The benefits of which every person may demand.

*Hill* v. *Texas*, 316 U.S. 400, 406 (1946); accord, *Taylor* v. *Louisiana*, 419 U.S. 527 (1975). Relief is also mandated by the strong statutory command of 18 U.S.C. § 243, which states:

> No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any state on account of race, color, or previous condition of servitude . . . .

This statute has been read by three (3) members of this Court to give "concreteness" to the generalities of the Fourteenth Amendment and to state with certainly that Congress intended the courts to deal with special severity when persons are excluded from serving on grand juries on account of their race. A proven violation of 18 U.S.C. § 243 voids the indictment. *Peters* v. *Kiff, supra* at 505-507 (White, J., concurring).[21]



## III. FEDERAL HABEAS CORPUS RELIEF IS AVAILABLE TO THE RESPONDENTS TO CHALLENGE THE VALIDITY OF THEIR CONVICTIONS WHEN THE FOREMAN OF THE GRAND JURY THAT INDICTED THEM WAS CHOSEN IN A MANNER VIOLATIVE OF THE FOURTHEENTH AMENDMENT.

### A. Introduction

The State of Tennessee herein seems to be making an attack on *Brown* v. *Allen*, 344 U.S. 443 (1953), and its progeny and wishes this Court to overrule *Brown* v. *Allen*, ignore the clear reading of 28 U.S.C. § 2241(c)(1) and § 2254(a), and extend the holding in *Stone* v. *Powell*, 428 U.S. 465 (1976), beyond Fourth Amendment claims. Before reaching the merits of such a contention, respondent would assert that this is not the case for this Court to even consider such an expansion of *Stone* v. *Powell*.

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[21] Mr. Justice White was joined in this opinion by Mr. Justice Brennan and Mr. Justice Powell.

The State of Tennessee thought so little of the *Stone* v. *Powell* argument that in its brief to the Court of Appeals, the state stated in total:

> The state respectfully submits that the district judge's citation to *Stone* v. *Powell* came at a time when the case was already decided on other grounds. The citation is surplusage and not relevant or determinative of the issues before this Court.

(R, Reply Brief for the State of Tennessee in the Court of Appeals at 24).

The decision of the Court of Appeals does not even mention *Stone* v. *Powell*, and it was only after the decision was rendered by the Court of Appeals on January 9, 1978, that the State raised the issue of *Stone* v. *Powell* in a Petition to Rehear. (A. 142-150). On March 30, 1978, the Court of Appeals refused to reconsider its decision of January 9, 1978, and in doing so, simply stated that "the court concludes that the issues raised therein [the *Stone* v. *Powell* issue] were fully considered upon the original submission and decision of this case." (A. 151).

The respondent is convinced that the State's view of *Stone* v. *Powell* is incorrect. However, should this Court want to consider a drastic expansion of the doctrine of *Stone* v. *Powell* beyond Fourth Amendment claims, it should not come in a case in which this Court does not even have the benefit of a reasoned decision by the Court of Appeals on the issue.



While respondents adhere to the view expressed above, they, of course, must address the merits of the issue.

### B. The "Great Writ" Is Available In This Case.

The writ of habeas corpus ad subjiciendum is given constitutional recognition in Article I, Section 9, clause 2 of the United States Constitution. The constitutional recognition, however, does not define the precise scope of the writ, and the first judiciary act authorized federal courts to issue the writ only on behalf of prisoners "in custody under the authority of the United States." In 1867 the writ was made applicable to any person "in custody in violation of the Constitution or laws .... of the United States," including state prisoners.[22] 28 U.S.C. § 2241(c)(3). See also 28 U.S.C. § 2254(a). So while the Constitution protects the "Great Writ," it is Congress that sets it exact parameters by statute. *Brown* v. *Allen*, 344 U.S. 443, 498-500 (1953) (Frankfurter, J., concurring).

> In so far as this jurisdiction enables federal district courts to entertain claims that State Supreme Courts have denied rights guaranteed by the United States Constitution, it is not a case of a lower court sitting in judgment or a higher

[22] The history of the writ as applied to state prisoners is traced in *Developments in the Law - Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1048-62 (1970). See *Wainwright* v. *Sykes*, 433 U.S. 72, 74-81 (1977).

> court. It is merely one aspect of respecting the Supremacy Clause of the Constitution whereby federal law is higher than state law. It is for the Congress to designate the member in the hierarchy of the federal judiciary to express the higher law. The fact that Congress has authorized district courts to be the organ of the higher law rather than a Court of Appeals, or exclusively this Court, does not mean that it allows a lower Court to overrule a higher Court. It merely expresses the choice of Congress how the superior authority of federal law should be asserted.

*Brown* v. *Allen, supra* at 510 (Frankfurter, J., concurring).

In recent years the writ has undergone some change and much of the change in the scope of the writ has been a reaction to judicial hostility to the exclusionary rule and to more favorable acceptance by this Court of the policy of adhering to the State procedural rules. Recent cases[23] by this Court have sharply curtailed the impact of *Fay* v. *Noia*, 372 U.S. 391 (1963), and in *Stone* v. *Powell*, 428 U.S. 465 (1976), this Court held that Fourth Amendment claims were not cognizable in a "federal habeas corpus proceeding if there had been a full and fair hearing in state court on the Fourth Amendment issue." *Stone* v. *Powell* certainly reversed by implication *Kaufman* v. *United States*, 394 U.S. 218 (1969).

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[23] See *Wainwright* v. *Sykes*, 433 U.S. 72 (1977); *Francis* v. *Henderson*, 425 U.S. 536 (1976); *Tollett* v. *Henderson*, 411 U.S. 258 (1973).



Several recent decisions by this Court, however, indicate that the recent changes in the scope of the writ may be at an end. In *Swain* v. *Pressley*, 430 U.S. 372 (1977), this Court recognized that Congress had great control over the scope of the writ in making changes in the availability of review under 28 U.S.C. § 2255 in the District of Columbia. It would appear that *Swain* again recognized the validity of Congressional control over the writ and that further restriction on claims congnizable under 28 U.S.C. § 2241(c)(3) and 28 U.S.C. § 2254(a) should be considered very carefully.

In *Wainwright* v. *Sykes*, 433 U.S. 72 (1977), this Court held that a defendant who failed to comply with a State's contemporaneous objection rule was not entitled to federal habeas corpus review of his *Miranda* claim. In reaching its decision in *Wainwright*, this Court reviewed the history of federal habeas corpus jurisdiction, canvassed the types of federal claims that may be properly considered on habeas corpus, and indicated that the scope of the writ as set forth in *Brown* v. *Allen, supra*, was still good law. *Wainwright* v. *Sykes, supra* at 79, 87. Certainly no member of this Court has expressed a belief that the clock should be completely turned back on the scope of the "Great Writ." See *Schneckloth* v. *Bushamonte*, 412 U.S. 218, 255-56 (1973) (Powell, J., concurring).

Mr. Justice Jackson was a sometime critic of the expansion of the writ, but he recognized its need for the protection of federal rights, and he simply stated

what is as timely today as it was twenty-five (25) years ago:

> Society has no interest in maintaining an unconstitutional conviction and every interest in preserving the writ of habeas corpus to nullify them when they occur.

*Brown* v. *Allen, supra* at 548 (Jackson, J., concurring).

The arguments pro and con as to the scope of the writ have been made all too often to this Court and are well chronicled in the decisions of this Court and legal literature.[24] They do not bear repeating. The cit-

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[24] See, e.g., *Stone* v. *Powell, supra* (majority and dissenting decisions); *Schneckloth* v. *Bustamonte, supra* (Powell, J., concurring); *Kaufman* v. *United States, supra Irrelevant? Collateral Attacks on Criminal Judgments*, 38 U. Chi. L.Rev. 142 (1970); Reitz, *Federal Habeas Corpus: Post Conviction Remedy for State Prisoners*, 108 U. Pa. L.Rev. 461 (1960); Wright and Sofaer, *Federal Habeas Corpus for State Prisoners:* The *Allocation of Fact-Finding Responsibility*, 75 Yale L.J. 895 (1966). Several members of this Court have commented on the impact of the heavy caseload now facing this Court. This is somewhat related to the impact of *Stone* v. *Powell*, as the necessity for the Court to review decisions of State Courts on petition for certiorari becomes greater if habeas corpus jurisdiction is removed from the Federal District Courts. See generally *Duncantell* v. *Texas*, *U.S.* , *47 U.S.L.W. 3386 (Dec. 5, 1978) (No. 77-1831) (Brennan, J., dissenting); Brown Transport Corp.* v. *Atcon, Inc.*, U.S. , 47 U.S.L.W. 3387 (Dec. 5, 1978) (No. 77-1581) (White, J., dissenting) (Burger, C.J.; Brennan, J., comments); *Mincey* v. *Arizona*, U.S. , 98 S.Ct. 2408 (Marshall, J., concurring); Stolz, *Federal Review of State Court Decisions of Federal Questions: The Need for Additional Appellate Capacity*, 64 Calif. L.Rev. 943, 960-62 (1976) (habeas corpus as a device for circumventing lack of appellate capacity).



izens of this country who most need the protection of the law look to the federal courts for the protection of federal constitutional rights and the duty to protect these rights should not be abrogated to the states. Congress did not intend that the duty be abrogated, and society certainly has no legitimate interest in imprisoning persons in violation of the Constitution.

While respondents adhere strongly to the view that decisions of this Court recognize that claims of grand jury discrimination in State Court proceedings are cognizable in federal habeas corpus proceedings,[25] the respondents recognize that several members of this Court have suggested that *Stone* v. *Powell* makes a "strong case" that claims of grand jury discrimination are not cognizable on federal habeas corpus. *Castaneda* v. *Partida*, 430 U.S. 482, 508 n.1 (Powell, J., dissenting, joined by the Chief Justice and Mr. Justice Rhenquist).[26] While at first blush it may seem that a case could be made for the extension of *Stone* v. *Powell* to grand jury discrimination cases, an analysis of the issues involved should lead to an opposite conclusion.

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[25] See, e.g., *Castañeda* v. *Partida*, 430 U.S. 482 (1977); *Brown* v. *Allen*, 344 U.S. 443 (1953).

[26] Mr. Justice Stewart dissented separately and stated that he was in "substantial agreement" with Mr. Justice Powell's dissent.

### C. This Case Calls For Application Of The Traditional Scope Of The Writ.

Unwritten in the criticism of the use of the writ of habeas corpus in the last forty (40) years is the concept that the expansion of the writ may have outserved its usefulness. While respondents disagree with this assessment, an analysis of early decisions of this Court supports the idea that the scope of the writ as it existed prior to 1953 would warrant the granting of relief in this case.

In grand jury discrimination cases, this Court adheres to the idea that a grand jury that is selected in violation of the Fourteenth Amendment cannot return valid indictments and therefore subsequent proceedings are invalid. *Cassell* v. *Texas*, 339 U.S. 282 (1950).

It is the law in Tennessee that unless the signature of the grand jury foreman is affixed to the indictment, the indictment is "fatally defective." *Bird* v. *State*, 103 Tenn. 343, 344, 52 S.W. 1076 (1889). If the indictment is defective, "the defendant should not [be] held to answer it." *Gunkle* v. *State*, 65 Tenn. 626, 627 (1872). Given the legal requirement of a grand jury foreman, the absence of a legally selected foreman would deprive the trial court of jurisdiction of the case because without a foreman or forewoman, there is no valid indictment, and "the so-called indictment has no legal efficiency whatever," and "the defendant could not be held to answer it." *State* v. *Herron*, 86 Tenn. 442, 448 (1888). Under Tennessee law, if an



improperly selected or unqualified person participates in the grand jury proceeding, the indictment is of no effect. See, e.g., *State* v. *Duncan*, 15 Tenn. 271, 275 (1834).

This case calls then for nothing more than the application of the traditional principle that if the committing court did not have jurisdiction because of a violation of federal law, relief should be granted on application to a federal court for habeas corpus relief. See *Ex parte Wilson*, 114 U.S. 417 (1885) (this Court ordered the release of a federal prisoner who was convicted without a grand jury indictment).

In *In re Moran*, 203 U.S. 96 (1906), one of the challenges made to the jurisdiction of the Oklahoma court was that the grand jury was not constituted as provided by territorial law, thus depriving the territorial court of jurisdiction. Justice Holmes, writing for the court, rejected this claim because a violation of territorial law was not considered a violation of "The Constitution or any law or Treaty of the United States" under the federal habeas corpus statute. Justice Holmes' decision certainly is to be read as meaning that if the grand jury in Oklahoma had been selected in a manner violative of the Constitution or of the law of the United States, he would have granted relief. In this case, where there is a clear violation of the Fourteenth Amendment and 18 U.S.C. § 243, under the

reasoning of the Court in *Moran*, relief should be granted. *In re Moran*, *supra* at 103-104[27]

Under Tennessee law if the indictment is "void," the State Court is deprived of jurisdiction[28] and if the indictment is void because of a violation of federal law, then *In re Moran* should apply.

### D. There Was No Full And Fair Hearing In This Case And Therefore Stone V. Powell Does Not Apply.

Further, *Stone* v. *Powell* does not apply in this case because the respondents did not receive a "full and fair" hearing in State Court within the meaning of the *Stone* decision. In determining whether or not a full and fair hearing was held, this Court in *Stone* referred to the standards of *Townsend* v. *Sain*, 372 U.S. 293 (1963). *Stone* v. *Powell*, *supra* at 494 n.36. Of course, *Stone* only precludes habeas review when the petitioner had "an opportunity for full and fair litigation of [his] . . . claim."

*Townsend* was a habeas corpus action brought by a state prisoner as a collateral review of what he

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[27] This interpretation of *In re Moran* is inconsistent with this Court's decisions in *Andrews* v. *Swartz*, 156 U.S. 277 (1895) and *In re Wood*, 140 U.S. 278 (1891). Neither *Andrews* or *In re Wood* are mentioned by Justice Holmes in the *Moran* decision.

[28] If the indictment is illegal in Tennessee, it confers no subject matter jurisdiction on the court. *State* v. *Hughes*, 212 Tenn. 644, 648, 371 S.W.2d 445 (1963); *Robinson* v. *City of Memphis*, 197 Tenn. 598, 277 S.W.2d 341 (1955).



claimed was the denial of his federal constitutional rights during a state criminal proceedings. Specifically, he alleged that a coerced confession had been admitted in evidence when it should have been suppressed. A hearing had been held by the State Court Judge on a suppression motion, but it had been denied, with the State Judge stating "Gentlemen, the Court will deny the motion to suppress and admit the statement into evidence." *Townsend*, *supra* at 302 n.1. The Court below had denied the application for the writ without an evidentiary hearing, stating that the State Court record was sufficient for a determination that there was no violation of the petitioner's constitutional rights. This Court reversed and in so doing set out six (6) situations in which a District Court must hold an evidentiary hearing. Two (2) of the six (6) situations are relevant here:

(1) Where the State Court has not made adquate factual or legal finding to support its conclusions. *Townsend*, *supra* at 313-16.

(2) Where "evidence crucial to the adequate consideration of the constitutional claim was not developed at the State hearing," unless there was "inexcusable" default under *Fay* v. *Noia*, 372 U.S. 391 (1963). *Townsend*, *supra* at 317.

The citation in *Stone* to *Townsend* must suggest that this Court considers the two (2) situations above to be among the ones in which "an opportunity for full and fair litigation" of a claim is absent.

The first situation involves the State Court's not making findings of fact and leaving the legal grounds for its conclusion uncertain. At the end of the State Court hearing, the State Judge merely stated that the *pro se* plea in abatement was denied. (A. 35, 36).

Returning to *Townsend*, this Court stated:

> The State Trial Judge rendered niether an opinion, conclusions of law, nor findings of fact . . . . In short, there are no indicia which would indicate whether the trial judge applied the proper standard of federal law in ruling upon the admissibility or the confession.

*Townsend, supra* at 320. This, of course, relates to need for findings of fact and law in the State Court as stated in *Townsend, supra* at 313-16. In this case, the State Trial Judge made no findings of fact and no findings of law. It is impossible to tell if he applied the "correct constitutional standards" and to what facts he applied them. *Townsend* places some obligation on State Courts to articulate reasons for their decisions on federal constitutional questions. In the absence of such reasons, a habeas petitioner cannot be said to have received "even . . . the semblance of a full and fair hearing." *Townsend, supra* at 313.

The second *Townsend* category is one in which, "for any reason not attributable to the inexcusable neglect of petitioner, see *Fay* v. *Noia*, 372 U.S. [391], 438, evidence crucial to the adequate consideration of the constitutional claim was not developed at the State



hearing." *Townsend, supra* at 317. The evidence crucial to the respondents' claim is the testimony of the State Trial Judge as to how and why he selected the grand jury foreman. It was certainly an awkward situation in which the State Judge whose very actions were being brought into question was presiding at the evidentiary hearing. It is easy to see why he was not called to the stand and questioned as to his role, and yet the information that he could provide was critical to the issue. The failure of respondents' court-appointed lawyers to bring out these relevant facts under the circumstances in this case cannot be regarded as the respondents' inexcusable default under the standards set out in *Fay* v. *Noia*, , 372 U.S. 391, 438, adopted by *Towsend, supra* at 317.

It would also seem unimaginable that the vindication of constitutional claims should depend upon findings of fact by and a hearing conducted before the very party whose conduct was called into constitutional question.[29] The same judge whose conduct was at issue sat as the judge at the evidentiary hearing in which the claim of discrimination was litigated.

### E. *Stone* v. *Powell* Is Limited To Fourth Amendment Claims.

The District Court below, in its order denying the respondents' motion to reconsider cited *Stone* v.

[29] Cf. *Tumey* v. *Ohio*, 273 U.S. 510 (1927) (defendant has a right to a judge who has no interest in the proceeding).

*Powell*, 428 U.S. 465 (1976), as additional authority as to why the case should be dismissed. (A. 124-26). The District Court argued that *Stone* v. *Powell* precluded federal review by habeas corpus of the respondents' claims if they had "received a full and fair hearing in state court as to his claim." The District Court also cited *O'Berry* v. *Wainwright*, 546 F.2d 1204 (5th Cir. 1976), as authority for this proposition. The Court of Appeals rightfully rejected this reasoning as *Stone* v. *Powell* only applies to Fourth Amendment questions.

*Stone* v. *Powell* has no application to non Fourth Amendment claims. The rationale of *Stone* v. *Powell* is that the exclusionary rule will not be applied on collateral review of Fourth Amendment claims because of the ineffectiveness of the rule. In response to the dissenters' claim that *Stone* would bring about a "drastic withdrawal of federal habeas corpus jurisdiction," the majority responded:

> *With all respect the hyperbole of the dissenting opinion is misdirected. Our decision today is not concerned with the scope of the habeas corpus statute as authority for litigating constitutional claims generally.* We do reaffirm that the exclusionary rule is a judicially created remedy rather than a personal constitutional right . . . and we emphasize the minimal utility of the rule when sought to be applied to Fourth Amendment claims in a habeas corpus proceeding . . . In sum, we hold only that a federal court need not apply the exclusionary rule on habeas review of a



> Fourth Amendment claim absent a showing that the state prisoner was denied an opportunity for a full and fair litigation of that claim at trial and on direct review. Our decision does not mean that the federal court lacks jurisdiction over such a claim, but only that the application of the rule is limited to cases in which there has been *both such a showing and a Fourth Amendment violation* (emphasis added).

*Stone* v. *Powell*, 428 U.S. 465, 494 n.37.

The rejection of *Stone* for other than Fourth Amendment violations was applied, for example, by the Court of Appeals for the Fifth Circuit in *Greene* v. *Massey*, 546 F.2d 51 (5th Cir. 1977). In *Greene* a federal habeas corpus petition had been filed by a state prisoner alleging that his rights under the prohibition against double jeopardy had been violated. The Fifth Circuit rejected the contention of the State of Florida that *Stone* v. *Powell* should be applied and cited the above quotation. *Greene* v. *Massey*, 546 F.2d 5l, 53 (5th Cir. 1977).

The District Court's citation to *O'Berry* v. *Wainwright*, 546 F.2d 1204 (5th Cir. 1977), as authority for the application of *Stone* v. *Powell* is misdirected. *O'Berry* was a Fourth Amendment case, thus calling for the direct application of *Stone* v. *Powell*. Further, it was Chief Judge John R. Brown who authored both the *Greene* case (decided January 26, 1977) and the *O'Berry* case (decided February 11, 1977), and he obviously had well in mind the principles of *Stone* v.

*Powell* in both cases. There is absolutely no authority in the *O'Berry* case to indicate that *Stone* v. *Powell* applies to other than Fourth Amendent-exclusionary rule cases.

### F. The Several Rationales Used In *Stone* v. *Powell* Do Not Apply In This Case.

In deciding *Stone* v. *Powell*, this Court considered the rationale of the exclusionary rule and other factors that weighed against federal habeas corpus review of the Fourth Amendment claim. These factors as applied to the facts in this case will be discussed in turn.

In looking at the exclusionary rule as applied to the states in *Mapp* v. *Ohio*, 367 U.S. 643 (1961), this Court critically examined the doctrine of "judicial integrity" and "deterrence," rejected "judicial integrity" as a rationale for the exclusionary rule and further found the "deterrent" effect of the rule to be so attenuated by the time it was used in collateral proceedings as to be of no practical effect. There are several critical differences in grand jury discrimination cases. While this Court may have rejected the rationale of "judicial integrity" in exclusionary rule cases,[30] this Court has

[30] *Stone* v. *Powell*, *supra* at 435. The exclusionary rule normally involves constitutional violations by police officers while this case involves a constitutional violation committed by a state judge. A violation of constitutional protections by a judicial officer is a more direct assault upon judicial integrity than is the admission of evidence seized by police in violation of the Constitution.



not rejected such a rule in grand jury discrimination cases. In fact, this Court strongly adheres to such a rationale. See *Taylor* v. *Louisiana*, 419 U.S. 522 (1975); *Peters* v. *Kiff*, 407 U.S. 493, 498-99 (1972).

While this Court has never applied the rationale of deterrence to jury discrimination cases, an argument could be made that "deterrence" does support the relief granted below by the Court of Appeals. To the extent that deterrence is at issue in this case, this consideration, when dealing with a constitutional rule that effects state judges, is different than applying exclusionary rules to cases involving policemen. Predictably, state judges will be much more attentive to the remedial effects of federal decisions on federal law than are policemen.

The ruling by the Court of Appeals in this case has had an effect in Tennessee. Subsequent to the decision of the Court of Appeals, the September, 1978, *Judicial Newsletter* of the Tennessee Public Law Institute carried a lengthy article on *Mitchell* v. *Rose*, which was forwarded to every judge in the state. After a review of the law, the article concluded with several paragraphs on the "Implied Duties of the Tennessee Judiciary after *Mitchell*."[31] While such suggestions to the state judiciary do not guarantee obedience to constitutional rulings, it certainly appears that the Court of Appeals decision will have some remedial effect in Tennessee.

[31] Article is attached as appendix to this brief, at 11-17.

Beyond the concept of "judicial integrity" and the possible remedial aspects of "deterrence" lies the rationale of presumed prejudice in jury discrimination cases. This rationale has been discussed and explained earlier, and it is a concept consistently adhered to by this Court since 1879. *Strauder* v. *West Virginia*, *supra*. Presumed prejudice is based on rational human experience and the realization that bringing discrimination to light is an extremely difficult evidentiary proposition. In considering presumed prejudice, then, it should be recognized that the remedy in grand jury discrimination cases, unlike the Fourth Amendment exclusionary rule, has never been based *solely* on prophylactic considerations.

One other consideration is the concept of cross-sectionalism. Implicit in this Court's systematic exclusion decisions is the recognition that there is also a very real, albeit unquantifiable, harm to the individual interests of a criminal defendant whose case is processed through a system of decisionmaking from which the views of substantial minority groups have been excluded.

The rule of the enforcement of the Fourteenth Amendment through the voiding of convictions, when discrimination in the selection of the grand jury is shown, is no late comer to the judicial decisionmaking. This Court has applied such a remedy to the states since *Strauder* v. *West Virginia*, 100 U.S. 303 (1879), while the exclusionary rule was not applied to the states until *Mapp* v. *Ohio*, 367 U.S. 643, in 1961. It



was not until 1969 in *Kaufman* v. *United States*, 394 U.S. 217, 226 (1969), that this Court indicated in dicta that Fourth Amendment claims of state prioners were reviewable on federal habeas corpus, while habeas review of grand jury discrimination claims by state prisoners was established in 1953 in *Brown* v. *Allen*, 344 U.S. 443 (1953).

To the extent that systematic-exclusion claims are based upon "prophylactic" principles, *Peters* v. *Kiff*, 407 U.S. 493 (1972), establishes that those principles call for broader, not narrower, opportunity to litigate claims. In Fourth Amendment cases, standing to complain of illegal searches and seizures is limited to those criminal defendants whose substantive interests have been adversely affected by the search (see, e.g., *Rakas* v. *Illinois*, U.S. , 47 U.S.L.W. 4025 (Dec. 5, 1978) (No. 77-5781); *Brown* v. *United States*, 411 U.S. 223 (1973) ), whereas the precise holding in *Peters* is that white defendants may complain about the systematic exclusion of blacks. So while Fourth Amendment law has moved away from allowing opportunity to litigate the claims, this Court's jury discrimination cases have broadened the opportunity of defendants to raise constitutional claims.

To the extent that *Stone* v. *Powell* was based on considerations of federalism, the instant case does not present the same federalism, considerations. This case involves the enforcement of the Fourteenth Amendment and 18 U.S.C. § 243, which have always been applied to the states by federal courts to protect the

rights of black citizens. It does not involve the enforcement of the first ten Amendments, which have only been applied to the sometimes reluctant states by judicial opinion over the last fifty (50) years. In this area, we can discern the clear intent of Congress that the Fourteenth Amendment and the Post Civil War "civil rights" acts be enforced by the federal courts. See *Peters* v. *Kiff*, 407 U.S. 493, 505-07 (White, J., concurring); cf. *Monroe* v. *Pape*, 365 U.S. 167 (1961).

It is especially important in a case of this nature that the federal courts be open to claims of discrimination in the selection of the grand jury foreman or forewoman because the challenged state procedure is a procedure that directly involves the judiciary of Tennessee since it is the judge who chooses the grand jury foreman or forewoman. While it is always important to have an independent federal factfinder for the enforcement of federal claims, it is of vital importance in this case where the federal claim asserts that the *state trial judge* has followed unconstitutional procedures and the state judge presided over the challenge to his own conduct.

In constitutional decisionmaking by this Court, the doctrine of *stare decisis* has never been given strong adherence, but it is a consideration that should not be ignored. *Helvering* v. *Hallock*, 309 U.S. 106, 119 (1940); *Burnet* v. *Coronado Oil and Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting). Prior to *Stone* v. *Powell*, many criminal defendants and all



lower federal courts relied on the scope of federal habeas corpus jurisdiction as expressed in *Brown* v. *Allen*, and while *Stone* v. *Powell* is now the law of the land, its further expansion at the price of *stare decisis* should only be undertaken if the benefits involved far outweigh the cost.

For the reasons stated in this section of the brief, the respondents contend that the decision of *Stone* v. *Powell* should not be expanded to deny the respondents in this case a federal forum, as the costs of expanding *Stone* in this case would far outweigh the benefits and would do violence to previous decisions of this Court, to congressional statutes, and to the concept of equal justice for black citizens to which this Court has long been the vindicator. See R. Kluger, Simple Justice (1975).

This Court should continue to adhere to *Brown* v. *Allen* when claims of racial discrimination in the selection of a grand jury or grand jury foreman are raised[32]

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[32] Habeas corpus petitioners raising this type of claim must, of course, comply with this Court's decision in *Francis* v. *Henderson*, 425 U.S. 536 (1976).

## CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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# 1970 CENSUS OF HOUSING

## HOUSING CHARACTERISTICS FOR STATES, CITIES, AND COUNTIES

volume I

part 44 — Tennessee

Issued August 1972

U. S. DEPARTMENT OF COMMERCE
Peter G. Peterson, Secretary
James T. Lynn, Under Secretary
Harold C. Passer, Assistant Secretary for Economic Affairs and Administrator,
Social and Economic Statistics Administration
BUREAU OF THE CENSUS
George Hay Brown, Director



## Table 30. Selected Characteristics of Housing Units With Negro Head of Household, for Counties: 1970

(For minimum base for derived figures (percent, median, etc.) and meaning of symbols, see text)

| Counties With 400 or More Negro Population | Total Negro population | Occupied housing units | | | | | | | | | | 1.01 or more persons per room | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | Owner occupied | | Renter occupied | | | | |
| | | Total | Lacking some or all plumbing facilities | In one-unit structures | One-person households | Median number of rooms | Total | Median value (dollars) | Total | Lacking some or all plumbing facilities | Median contract rent (dollars) | Total | With all plumbing facilities |
| Anderson | 2 876 | 806 | 66 | 292 | 139 | 4.2 | 291 | 7 300 | 315 | 31 | 50 | 103 | 93 |
| Bedford | 2 663 | 793 | 255 | 635 | 172 | 4.4 | 378 | 6 400 | 415 | 147 | 42 | 146 | 89 |
| Bledsoe | 404 | 41 | 16 | 36 | 6 | 4.6 | 34 | 5000– | 7 | 3 | 30– | 7 | 3 |
| Blount | 2 505 | 739 | 173 | 693 | 122 | 4.7 | 568 | 6 000 | 171 | 65 | 33 | 123 | 83 |
| Bradley | 2 280 | 657 | 127 | 511 | 116 | 4.7 | 544 | 7 100 | 293 | 84 | 37 | 125 | 94 |
| Carroll | 3 080 | 898 | 481 | 823 | 201 | 4.3 | 567 | 5000– | 331 | 245 | 30– | 206 | 76 |
| Cheatham | 592 | 164 | 114 | 154 | 26 | 4.6 | 118 | 5 800 | 44 | 39 | 35 | 33 | 6 |
| Chester | 1 274 | 341 | 169 | 330 | 63 | 4.6 | 199 | 5 100 | 142 | 108 | 30– | 87 | 33 |
| Cocke | 699 | 175 | 75 | 167 | 17 | 4.6 | 105 | 5000– | 70 | 35 | 35 | 48 | 25 |
| Coffee | 1 191 | 313 | 105 | 254 | 53 | 4.6 | 161 | 7 100 | 152 | 60 | 34 | 75 | 41 |
| Crockett | 3 007 | 710 | 451 | 679 | 119 | 4.3 | 359 | 5 800 | 351 | 313 | 30– | 239 | 78 |
| Davidson | 87 851 | 34 213 | 2 135 | 14 918 | 4 648 | 4.4 | 9 606 | 11 500 | 14 607 | 1 480 | 61 | 4 245 | 3 812 |
| Decatur | 473 | 120 | 65 | 116 | 17 | 4.7 | 77 | 7 000 | 43 | 31 | 30– | 31 | 15 |
| Dickson | 1 398 | 365 | 192 | 336 | 65 | 4.7 | 253 | 7 200 | 112 | 81 | 30– | 83 | 30 |
| Dyer | 3 978 | 1 178 | 584 | 1 028 | 296 | 4.3 | 528 | 6 600 | 650 | 433 | 30– | 250 | 88 |
| Fayette | 13 887 | 2 825 | 2 287 | 2 661 | 295 | 4.0 | 984 | 7 500 | 1 841 | 1 755 | 30– | 1 244 | 144 |
| Franklin | 2 104 | 521 | 193 | 480 | 73 | 4.9 | 371 | 5 100 | 150 | 76 | 30 | 130 | 62 |
| Gibson | 9 816 | 2 618 | 1 030 | 2 257 | 463 | 4.4 | 1 335 | 5 800 | 1 283 | 703 | 31 | 674 | 333 |
| Giles | 3 436 | 980 | 502 | 833 | 190 | 4.4 | 495 | 6 800 | 485 | 282 | 30 | 217 | 89 |
| Grainger | 1 137 | 292 | 112 | 242 | 49 | 4.8 | 175 | 7 600 | 117 | 54 | 35 | 55 | 24 |
| Hamblen | 2 086 | 543 | 109 | 450 | 77 | 4.9 | 335 | 7 600 | 208 | 37 | 40 | 79 | 56 |
| Hamilton | 44 397 | 13 952 | 533 | 8 211 | 3 005 | 4.3 | 4 733 | 9 200 | 9 219 | 315 | 52 | 2 506 | 2 385 |
| Hardeman | 8 612 | 1 655 | 1 040 | 1 523 | 179 | 4.3 | 821 | 6 800 | 834 | 693 | 30– | 691 | 193 |
| Hardin | 1 041 | 280 | 157 | 265 | 43 | 4.8 | 191 | 5000– | 89 | 66 | 30– | 57 | 30 |
| Hawkins | 992 | 285 | 110 | 264 | 52 | 4.9 | 203 | 7 400 | 82 | 39 | 33 | 54 | 30 |
| Haywood | 10 723 | 2 452 | 1 732 | 2 312 | 344 | 4.2 | 874 | 7 100 | 1 578 | 1 358 | 30– | 894 | 173 |
| Henderson | 1 728 | 456 | 207 | 387 | 77 | 4.6 | 270 | 6 600 | 186 | 107 | 30– | 101 | 45 |
| Henry | 3 139 | 947 | 439 | 841 | 209 | 4.2 | 505 | 5 000 | 442 | 255 | 30 | 182 | 84 |
| Hickman | 597 | 169 | 89 | 161 | 35 | 4.7 | 114 | 5 300 | 55 | 35 | 30– | 41 | 17 |
| Humphreys | 516 | 155 | 69 | 143 | 41 | 4.3 | 110 | 8 400 | 45 | 21 | 36 | 35 | 17 |
| Jefferson | 797 | 223 | 90 | 209 | 41 | 5.0 | 165 | 5 900 | 58 | 33 | 30– | 36 | 10 |
| Knox | 23 277 | 6 833 | 409 | 4 624 | 1 434 | 4.6 | 3 143 | 9 100 | 3 670 | 246 | 45 | 936 | 880 |
| Lake | 1 840 | 475 | 367 | 451 | 108 | 3.7 | 73 | 5 600 | 402 | 346 | 30– | 155 | 19 |
| Lauderdale | 6 826 | 1 657 | 1 044 | 1 549 | 299 | 4.1 | 734 | 5 700 | 923 | 753 | 30– | 523 | 143 |
| Lawrence | 430 | 140 | 49 | 113 | 32 | 4.4 | 79 | 5 900 | 61 | 22 | 36 | 19 | 8 |
| Lincoln | 2 [illegible] | 759 | 309 | 609 | 137 | 4.4 | 322 | 6 500 | 437 | 209 | 32 | 173 | 88 |
| Loudon | 471 | 127 | 45 | 122 | 18 | 4.9 | 91 | 5 300 | 36 | 15 | 30 | 22 | 14 |
| McMinn | 1 808 | 468 | 133 | 411 | 85 | 4.9 | 314 | 6 300 | 154 | 48 | 31 | 107 | 71 |
| McNairy | 1 340 | 394 | 198 | 278 | 37 | 4.4 | 212 | 5000– | 82 | 71 | 30– | 95 | 21 |
| Madison | 20 444 | 5 397 | 2 287 | 3 858 | 989 | 4.2 | 2 101 | 7 700 | 3 196 | 1 685 | 34 | 1 423 | 663 |
| Marion | 1 195 | 336 | 116 | 293 | 61 | 4.9 | 239 | 5 600 | 97 | 50 | 35 | 71 | 32 |
| Marshall | 1 863 | 509 | 217 | 464 | 85 | 4.5 | 271 | 7 200 | 238 | 121 | 30 | 106 | 41 |
| Maury | 8 035 | 2 355 | 893 | 2 013 | 427 | 4.4 | 1 244 | 5 300 | 1 011 | 545 | 30 | 524 | 249 |
| Meigs | 868 | 228 | 53 | 215 | 35 | 5.1 | 191 | 6 000 | 37 | 19 | 30– | 47 | 33 |
| Montgomery | 10 620 | 2 643 | 623 | 2 053 | 469 | 4.8 | 1 458 | 9 300 | 1 185 | 295 | 46 | 536 | 387 |
| Obion | 2 108 | 671 | 270 | 599 | 171 | 4.4 | 337 | 6 000 | 334 | 180 | 31 | 114 | 61 |
| Putnam | 480 | 119 | 59 | 104 | 24 | 4.5 | 81 | 5 100 | 38 | 16 | 60 | 28 | 13 |
| Rhea | 585 | 171 | 23 | 156 | 35 | 5.0 | 115 | 6 900 | 56 | 8 | 31 | 26 | 22 |
| Roane | 1 568 | 442 | 157 | 393 | 85 | 4.8 | 312 | 6 100 | 130 | 51 | 31 | 84 | 47 |
| Robertson | 4 625 | 1 280 | 551 | 1 036 | 273 | 4.2 | 472 | 5 700 | 808 | 408 | 35 | 324 | 152 |
| Rutherford | 7 135 | 1 883 | 668 | 1 435 | 290 | 4.4 | 1 006 | 7 000 | 877 | 338 | 39 | 424 | 220 |
| Shelby | 266 159 | 68 160 | 6 752 | 45 333 | 11 344 | 4.1 | 29 485 | 9 600 | 39 675 | 4 821 | 50 | 20 013 | 17 700 |
| Smith | 631 | 160 | 88 | 149 | 36 | 4.4 | 98 | 6 900 | 62 | 44 | 30– | 45 | 11 |
| Sullivan | 2 432 | 694 | 76 | 466 | 141 | 4.8 | 357 | 10 000 | 339 | 48 | 40 | 94 | 81 |
| Sumner | 4 270 | 1 160 | 514 | 1 004 | 197 | 4.5 | 644 | 7 300 | 516 | 282 | 31 | 259 | 119 |
| Tipton | 9 084 | 2 106 | 1 462 | 1 914 | 380 | 4.1 | 808 | 5 900 | 1 298 | 1 065 | 30– | 761 | 172 |
| Trousdale | 932 | 275 | 162 | 250 | 32 | 4.6 | 153 | 6 200 | 122 | 92 | 30– | 52 | 14 |
| Warren | 1 216 | 343 | 126 | 294 | 66 | 4.4 | 201 | 6 500 | 142 | 62 | 30 | 70 | 40 |
| Washington | 2 833 | 736 | 72 | 577 | 160 | 4.9 | 411 | 9 000 | 325 | 34 | 45 | 129 | 107 |
| Wayne | 1 732 | 479 | 166 | 442 | 109 | 4.3 | 286 | 5000– | 193 | 104 | 30– | 98 | 59 |
| Williamson | 4 790 | 1 215 | 504 | 909 | 172 | 4.3 | 594 | 8 700 | 621 | 293 | 38 | 341 | 166 |
| Wilson | 4 139 | 1 155 | 506 | 962 | 188 | 4.6 | 683 | 7 000 | 472 | 199 | 38 | 247 | 130 |

## Table 29. Selected Characteristics for Counties: 1970

(For minimum base for derived figures (percent, median, etc.) and meaning of symbols, see text)

| Counties | Total population | Total housing units | Year-round housing units | | | | | | | | | | | | | | Vacant for sale only or for rent |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | Occupied housing units | | | | | | | | | | | |
| | | | | | | | | | Owner occupied | | Renter occupied | | | 1.01 or more persons per room | | | |
| | | | Total | Lacking some or all plumbing facilities | In non-unit structures | One-person households | Median number of rooms | With Negro head of household | Total | Median value (dollars) | Total | Lacking some or all plumbing facilities | Median contract rent (dollars) | Total | With all plumbing facilities | | |
| Anderson | 60 [illegible] | 20 451 | 20 425 | 2 407 | 16 151 | 2 680 | 4.9 | 606 | 13 536 | 11 300 | 5 595 | 897 | 62 | 1 605 | 1 045 | 678 | |
| Bedford | 25 039 | 8 820 | 8 814 | 1 442 | 7 684 | 1 186 | 5.1 | 793 | 5 489 | 11 600 | 2 725 | 590 | 47 | 663 | 459 | 300 | |
| Benton | 12 126 | 4 637 | 4 535 | 930 | 4 031 | 583 | 4.9 | 88 | 3 259 | 9 200 | 835 | 239 | 45 | 328 | 217 | 148 | |
| Bledsoe | 7 643 | 2 357 | 2 355 | 886 | 2 207 | 263 | 4.9 | 41 | 1 650 | 6 600 | 518 | 268 | 34 | 291 | 112 | 72 | |
| Blount | 63 744 | 21 835 | 21 683 | 2 827 | 18 824 | 2 401 | 5.1 | 739 | 15 300 | 12 300 | 5 041 | 952 | 54 | 1 560 | 1 036 | 541 | |
| Bradley | 50 686 | 16 446 | 16 420 | 1 687 | 13 576 | 1 838 | 5.0 | 657 | 10 685 | 13 000 | 4 884 | 746 | 58 | 1 534 | 1 177 | 510 | |
| Campbell | 36 045 | 8 916 | 8 776 | 3 246 | 8 017 | 1 180 | 4.8 | 42 | 5 727 | 6 200 | 2 326 | 1 050 | 35 | 1 084 | 388 | 369 | |
| Cannon | 8 467 | 3 075 | 3 067 | 966 | 2 878 | 391 | 5.0 | 51 | 2 193 | 9 100 | 642 | 307 | 39 | 239 | 94 | 77 | |
| Carroll | 25 741 | 9 401 | 9 394 | 2 201 | 8 289 | 1 332 | 4.8 | 898 | 6 424 | 9 100 | 2 241 | 796 | 44 | 706 | 396 | 298 | |
| Carter | 42 575 | 14 500 | 14 446 | 2 777 | 12 574 | 1 611 | 5.0 | 96 | 10 489 | 10 100 | 2 831 | 709 | 47 | 1 193 | 713 | 427 | |
| Cheatham | 13 199 | 4 223 | 4 218 | 944 | 3 714 | 396 | 4.9 | 164 | 3 109 | 11 300 | 829 | 316 | 53 | 466 | 295 | 93 | |
| Chester | 9 927 | 3 243 | 3 243 | 788 | 2 904 | 425 | 4.8 | 341 | 2 143 | 8 700 | 894 | 368 | 38 | 283 | 151 | 71 | |
| Claiborne | 19 420 | 6 486 | 6 478 | 2 954 | 5 994 | 720 | 4.8 | 78 | 4 274 | 7 800 | 1 621 | 979 | 30 | 729 | 202 | 298 | |
| Clay | 6 624 | 2 383 | 2 382 | 1 086 | 2 219 | 310 | 4.8 | 44 | 1 623 | 7 300 | 509 | 309 | 32 | 256 | 70 | 63 | |
| Cocke | 25 283 | 8 159 | 8 154 | 2 643 | 7 180 | 931 | 4.7 | 175 | 5 189 | 8 100 | 2 411 | 997 | 40 | 1 106 | 526 | 230 | |
| Coffee | 32 572 | 11 104 | 11 099 | 1 429 | 9 401 | 1 294 | 5.2 | 313 | 7 291 | 12 600 | 2 877 | 470 | 58 | 711 | 489 | 581 | |
| Crockett | 14 402 | 5 028 | 5 011 | 1 499 | 4 645 | 776 | 4.9 | 710 | 3 172 | 8 500 | 1 474 | 804 | 30 | 540 | 258 | 169 | |
| Cumberland | 20 733 | 6 766 | 6 744 | 2 034 | 6 096 | 784 | 5.0 | 1 | 4 656 | 8 600 | 1 541 | 590 | 43 | 789 | 353 | 164 | |
| Davidson | 448 003 | 147 266 | 147 223 | 6 283 | 99 669 | 23 154 | 5.0 | 24 213 | 83 694 | 15 700 | 56 715 | 3 525 | 81 | 10 441 | 9 519 | 5 133 | |
| Decatur | 9 457 | 3 804 | 3 751 | 999 | 3 453 | 446 | 4.9 | 120 | 2 473 | 7 600 | 731 | 257 | 43 | 255 | 137 | 124 | |
| De Kalb | 11 151 | 4 374 | 4 365 | 1 191 | 3 966 | 536 | 5.1 | 87 | 2 848 | 10 000 | 904 | 344 | 40 | 293 | 160 | 208 | |
| Dickson | 21 977 | 7 563 | 7 542 | 1 685 | 6 678 | 1 010 | 5.1 | 365 | 5 415 | 10 700 | 1 606 | 533 | 53 | 634 | 386 | 173 | |
| Dyer | 30 427 | 10 680 | 10 665 | 2 301 | 9 212 | 1 726 | 4.9 | 1 178 | 6 339 | 10 600 | 3 711 | 1 406 | 45 | 945 | 525 | 280 | |
| Fayette | 22 692 | 5 947 | 5 945 | 2 944 | 5 368 | 614 | 4.5 | 2 825 | 2 918 | 10 900 | 2 645 | 2 000 | 30 | 1 517 | 353 | 139 | |
| Fentress | 12 593 | 4 049 | 4 045 | 2 011 | 3 789 | 445 | 5.1 | – | 2 604 | 5 700 | 1 034 | 660 | 30 | 550 | 131 | 159 | |
| Franklin | 27 244 | 8 771 | 8 763 | 1 453 | 7 856 | 1 076 | 5.2 | 521 | 6 015 | 10 200 | 2 158 | 517 | 48 | 786 | 474 | 285 | |
| Gibson | 47 871 | 17 103 | 17 083 | 3 225 | 14 826 | 2 577 | 4.9 | 2 618 | 10 952 | 10 000 | 4 941 | 1 544 | 42 | 1 425 | 858 | 557 | |
| Giles | 22 138 | 7 966 | 7 963 | 2 234 | 6 791 | 1 075 | 5.0 | 980 | 4 774 | 10 800 | 2 299 | 865 | 40 | 673 | 336 | 287 | |
| Grainger | 13 948 | 4 951 | 4 688 | 2 242 | 4 322 | 407 | 4.8 | 43 | 3 328 | 8 100 | 880 | 580 | 32 | 585 | 189 | 128 | |
| Greene | 47 630 | 16 024 | 16 014 | 4 243 | 13 916 | 1 819 | 5.1 | 292 | 11 000 | 11 600 | 3 687 | 1 379 | 51 | 1 266 | 612 | 481 | |
| Grundy | 10 631 | 3 571 | 3 395 | 1 297 | 3 143 | 352 | 4.7 | 2 | 2 586 | 5000– | 589 | 347 | 30 | 506 | 180 | 55 | |
| Hamblen | 38 696 | 12 716 | 12 707 | 1 472 | 10 664 | 1 267 | 5.0 | 543 | 8 548 | 12 200 | 3 432 | 545 | 58 | 1 036 | 769 | 443 | |
| Hamilton | 254 236 | 87 595 | 87 473 | 3 487 | 65 031 | 13 425 | 5.0 | 13 952 | 52 552 | 13 100 | 29 725 | 1 338 | 64 | 6 442 | 5 802 | 3 444 | |
| Hancock | 6 719 | 2 303 | 2 302 | 1 465 | 2 225 | 235 | 4.7 | 27 | 1 502 | 6 100 | 513 | 393 | 30– | 311 | 58 | 149 | |
| Hardeman | 22 435 | 6 473 | 6 458 | 2 302 | 5 856 | 825 | 4.8 | 1 655 | 3 667 | 8 800 | 2 127 | 1 140 | 35 | 1 065 | 425 | 221 | |
| Hardin | 18 212 | 6 474 | 6 430 | 1 817 | 5 993 | 733 | 4.9 | 280 | 4 069 | 8 100 | 1 692 | 738 | 36 | 767 | 404 | 213 | |
| Hawkins | 33 726 | 10 965 | 10 933 | 2 342 | 9 899 | 1 086 | 5.0 | 285 | 7 824 | 11 200 | 2 419 | 1 121 | 43 | 1 150 | 522 | 202 | |
| Haywood | 19 796 | 6 044 | 6 042 | 2 548 | 5 519 | 820 | 4.7 | 2 459 | 2 937 | 10 600 | 2 522 | 1 618 | 31 | 1 102 | 308 | 247 | |
| Henderson | 17 291 | 6 143 | 6 137 | 1 527 | 5 416 | 755 | 4.8 | 456 | 4 258 | 9 000 | 1 392 | 588 | 34 | 540 | 321 | 230 | |
| Henry | 23 749 | 9 305 | 9 091 | 1 730 | 7 740 | 1 429 | 4.8 | 947 | 6 029 | 9 200 | 2 209 | 616 | 46 | 682 | 442 | 202 | |
| Hickman | 12 096 | 4 222 | 4 214 | 1 327 | 3 871 | 491 | 4.9 | 169 | 2 959 | 7 500 | 913 | 411 | 41 | 368 | 164 | 106 | |
| Houston | 5 845 | 2 116 | 2 115 | 631 | 1 871 | 259 | 5.0 | 93 | 1 395 | 8 700 | 455 | 168 | 49 | 192 | 111 | 54 | |
| Humphreys | 13 560 | 4 802 | 4 784 | 902 | 4 258 | 545 | 5.1 | 155 | 3 300 | 11 500 | 960 | 229 | 52 | 348 | 249 | 150 | |
| Jackson | 8 141 | 2 912 | 2 911 | 1 326 | 2 731 | 316 | 4.9 | 4 | 1 933 | 9 600 | 686 | 423 | 30 | 262 | 87 | 113 | |
| Jefferson | 24 940 | 8 275 | 8 088 | 1 893 | 7 056 | 868 | 5.0 | 223 | 5 687 | 10 000 | 1 810 | 600 | 48 | 767 | 404 | 213 | |
| Johnson | 11 569 | 4 090 | 4 071 | 1 647 | 3 676 | 454 | 5.1 | 36 | 2 944 | 7 400 | 722 | 406 | 33 | 403 | 140 | 102 | |
| Knox | 276 293 | 93 011 | 92 962 | 6 402 | 71 609 | 13 651 | 5.0 | 6 833 | 57 656 | 12 900 | 29 709 | 2 701 | 66 | 6 285 | 5 197 | 3 647 | |
| Lake | 7 896 | 2 752 | 2 607 | 995 | 2 353 | 385 | 4.6 | 475 | 1 045 | 9 800 | 1 337 | 777 | 33 | 375 | 114 | 77 | |
| Lauderdale | 20 271 | 6 843 | 6 725 | 2 482 | 6 126 | 1 063 | 4.7 | 1 657 | 3 645 | 8 300 | 2 498 | 1 410 | 31 | 915 | 344 | 234 | |
| Lawrence | 29 097 | 9 546 | 9 531 | 1 986 | 8 802 | 1 151 | 5.1 | 140 | 6 692 | 9 200 | 2 358 | 740 | 40 | 845 | 483 | 200 | |
| Lewis | 6 761 | 2 395 | 2 395 | 561 | 2 136 | 333 | 5.1 | 27 | 1 668 | 7 500 | 523 | 169 | 43 | 184 | 100 | 123 | |
| Lincoln | 24 318 | 8 386 | 8 380 | 2 149 | 7 301 | 1 124 | 5.1 | 759 | 5 307 | 10 800 | 2 483 | 932 | 40 | 691 | 374 | 274 | |
| Loudon | 24 266 | 8 439 | 8 425 | 1 345 | 7 584 | 1 029 | 5.0 | 127 | 5 924 | 9 100 | 1 901 | 410 | 45 | 680 | 454 | 191 | |
| McMinn | 35 462 | 12 074 | 12 040 | 1 861 | 10 790 | 1 439 | 5.0 | 468 | 8 498 | 10 000 | 2 657 | 594 | 48 | 963 | 661 | 404 | |
| McNairy | 18 369 | 6 469 | 6 461 | 1 912 | 5 985 | 825 | 4.8 | 294 | 4 457 | 6 900 | 1 528 | 722 | 34 | 583 | 298 | 237 | |
| Macon | 12 315 | 4 420 | 4 417 | 1 806 | 4 128 | 464 | 5.0 | 26 | 3 121 | 9 400 | 948 | 571 | 36 | 326 | 132 | 135 | |
| Madison | 65 727 | 21 860 | 21 847 | 3 750 | 17 063 | 3 523 | 4.9 | 5 297 | 12 467 | 12 400 | 8 075 | 2 232 | 48 | 2 222 | 1 328 | 669 | |
| Marion | 20 577 | 6 562 | 6 523 | 1 481 | 5 677 | 782 | 4.8 | 336 | 4 485 | 7 200 | 1 649 | 509 | 43 | 862 | 479 | 147 | |
| Marshall | 17 319 | 6 124 | 6 116 | 1 256 | 5 334 | 851 | 5.1 | 509 | 3 962 | 10 200 | 1 691 | 479 | 42 | 455 | 272 | 254 | |
| Maury | 43 376 | 14 654 | 14 629 | 2 937 | 12 420 | 2 016 | 5.0 | 2 255 | 9 245 | 10 600 | 4 400 | 1 288 | 47 | 1 313 | 781 | 379 | |
| Meigs | 5 219 | 1 842 | 1 732 | 667 | 1 584 | 150 | 4.8 | 44 | 1 161 | 8 100 | 406 | 249 | 30– | 228 | 74 | 43 | |
| Monroe | 23 475 | 7 736 | 7 707 | 2 323 | 6 993 | 820 | 5.0 | 228 | 5 284 | 8 900 | 1 687 | 695 | 39 | 868 | 397 | 230 | |
| Montgomery | 62 721 | 18 815 | 18 806 | 2 083 | 14 477 | 2 027 | 5.1 | 2 643 | 10 982 | 13 500 | 5 847 | 701 | 68 | 1 623 | 1 290 | 1 376 | |
| Moore | 3 568 | 1 242 | 1 242 | 394 | 1 144 | 153 | 5.2 | 61 | 890 | 10 300 | 259 | 123 | 40 | 103 | 51 | 37 | |
| Morgan | 12 619 | 4 168 | 4 165 | 1 651 | 3 842 | 453 | 5.0 | 2 | 2 920 | 5 900 | 876 | 691 | 30 | 526 | 237 | 161 | |
| Obion | 29 906 | 11 068 | 11 038 | 1 538 | 9 580 | 1 769 | 5.0 | 671 | 7 040 | 11 000 | 3 272 | 730 | 49 | 694 | 469 | 385 | |
| Overton | 14 866 | 5 109 | 5 105 | 2 130 | 4 603 | 532 | 4.8 | 14 | 3 527 | 7 900 | 1 098 | 634 | 34 | 544 | 203 | 107 | |
| Perry | 5 238 | 2 160 | 2 135 | 648 | 1 917 | 257 | 4.8 | 35 | 1 455 | 7 100 | 347 | 158 | 33 | 137 | 68 | 55 | |
| Pickett | 3 774 | 1 382 | 1 382 | 617 | 1 320 | 157 | 4.9 | 1 | 953 | 6 800 | 229 | 145 | 30– | 145 | 36 | 82 | |
| Polk | 11 669 | 3 954 | 3 941 | 1 128 | 3 473 | 449 | 4.9 | – | 2 574 | 6 400 | 1 014 | 381 | 32 | 410 | 200 | 147 | |
| Putnam | 35 487 | 11 993 | 11 984 | 2 246 | 9 974 | 1 461 | 5.0 | 119 | 7 530 | 12 000 | 3 517 | 729 | 60 | 741 | 437 | 420 | |
| Rhea | 17 202 | 5 901 | 5 872 | 1 442 | 5 181 | 722 | 4.9 | 171 | 3 882 | 7 500 | 1 449 | 432 | 41 | 616 | 311 | 176 | |
| Roane | 38 881 | 13 189 | 13 072 | 1 875 | 11 517 | 1 546 | 5.1 | 442 | 9 118 | 10 500 | 2 985 | 570 | 45 | 1 176 | 813 | 371 | |
| Robertson | 29 102 | 9 859 | 9 841 | 2 209 | 8 578 | 1 280 | 4.9 | 1 280 | 6 045 | 10 800 | 3 026 | 1 053 | 45 | 1 008 | 623 | 263 | |
| Rutherford | 59 428 | 19 035 | 19 034 | 2 645 | 14 571 | 2 251 | 5.1 | 1 883 | 11 211 | 14 200 | 6 175 | 1 052 | 68 | 1 471 | 990 | 1 119 | |
| Scott | 14 762 | 4 648 | 4 641 | 2 189 | 4 194 | 510 | 4.8 | – | 2 954 | 5000– | 1 279 | 751 | 32 | 704 | 205 | 121 | |
| Sequatchie | 6 331 | 2 003 | 1 999 | 529 | 1 785 | 217 | 4.7 | – | 1 461 | 6 800 | 419 | 161 | 41 | 273 | 135 | 37 | |
| Sevier | 28 241 | 10 268 | 10 096 | 2 269 | 9 119 | 1 024 | 4.9 | 40 | 6 651 | 11 500 | 2 262 | 675 | 47 | 939 | 530 | 333 | |
| Shelby | 722 014 | 222 626 | 222 604 | 9 618 | 157 501 | 33 278 | 5.0 | 68 160 | 122 728 | 14 400 | 90 799 | 6 129 | 68 | 25 885 | 23 401 | 6 906 | |
| Smith | 12 509 | 4 489 | 4 487 | 1 553 | 4 079 | 588 | 5.2 | 160 | 3 050 | 10 000 | 1 098 | 533 | 39 | 335 | 133 | 134 | |
| Stewart | 7 319 | 2 751 | 2 738 | 1 013 | 2 484 | 308 | 4.9 | 50 | 1 886 | 8 200 | 524 | 274 | 40 | 215 | 89 | 121 | |
| Sullivan | 127 329 | 42 187 | 42 029 | 4 271 | 34 974 | 4 574 | 5.1 | 696 | 29 781 | 14 300 | 10 286 | 1 687 | 62 | 2 934 | 2 084 | 1 139 | |
| Sumner | 56 106 | 18 603 | 18 542 | 3 044 | 16 531 | 1 816 | 5.3 | 1 160 | 13 117 | 16 100 | 4 024 | 1 121 | 54 | 1 313 | 840 | 697 | |
| Tipton | 28 001 | 8 517 | 8 488 | 2 667 | 7 444 | 1 116 | 4.7 | 2 106 | 4 514 | 10 400 | 3 463 | 1 628 | 48 | 1 315 | 542 | 246 | |
| Trousdale | 5 155 | 1 813 | 1 813 | 645 | 1 613 | 219 | 4.9 | 275 | 1 082 | 10 300 | 579 | 298 | 39 | 183 | 74 | 65 | |
| Unicoi | 15 254 | 5 194 | 5 189 | 1 175 | 4 658 | 622 | 5.0 | 3 | 3 761 | 10 200 | 1 108 | 414 | 46 | 483 | 236 | 88 | |
| Union | 9 072 | 3 119 | 2 963 | 1 585 | 2 755 | 279 | 4.7 | 6 | 2 030 | 7 300 | 617 | 453 | 30 | 419 | 92 | 99 | |
| Van Buren | 3 758 | 1 292 | 1 292 | 586 | 1 190 | 127 | 4.8 | 6 | 918 | 6 200 | 239 | 151 | 33 | 139 | 49 | 21 | |
| Warren | 26 972 | 9 501 | 9 490 | 1 831 | 8 466 | 1 181 | 5.1 | 343 | 6 369 | 9 700 | 2 300 | 547 | 48 | 712 | 452 | 321 | |
| Washington | 73 924 | 24 240 | 24 214 | 2 846 | 19 428 | 3 101 | 5.1 | 736 | 15 875 | 13 600 | 6 658 | 1 034 | 63 | 1 856 | 1 352 | 877 | |
| Wayne | 12 365 | 4 180 | 4 178 | 1 554 | 3 878 | 492 | 5.0 | 64 | 2 992 | 6 900 | 827 | 432 | 34 | 394 | 152 | 102 | |
| Weakley | 28 827 | 10 146 | 10 138 | 1 904 | 8 596 | 1 502 | 4.8 | 479 | 6 747 | 9 700 | 2 653 | 689 | 50 | 612 | 400 | 328 | |
| White | 17 088 | 6 039 | 6 006 | 1 707 | 5 484 | 718 | 5.0 | 108 | 4 246 | 9 400 | 1 247 | 515 | 41 | 520 | 233 | 203 | |
| Williamson | 34 330 | 11 028 | 11 013 | 2 154 | 9 232 | 1 103 | 5.2 | 1 215 | 7 264 | 17 400 | 2 968 | 848 | 59 | 1 030 | 580 | 365 | |
| Wilson | 36 999 | 12 900 | 12 700 | 2 444 | 10 803 | 1 497 | 5.2 | 1 155 | 8 522 | 14 100 | 3 144 | 760 | 55 | 959 | 669 | 408 | |



PC(1)-B44

# 1970 CENSUS OF POPULATION

# General Population Characteristics

## TENNESSEE

Issued September 1971

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(For minimum base for derived figures (percent, median, etc.) and meaning of symbols, see text)

| County Subdivisions | Population | | | | | | | | | Households | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | Sex | | Race | | | Age | | | Total | | | Negro and other races | |
| | Total | Male | Female | White | Negro | Other | Median age | Percent under 18 years | Percent 65 years and over | In group quarters | Number | Population | Persons per household | Number | Population | Persons per household |
| **SULLIVAN—Continued** | | | | | | | | | | | | | | | | |
| East Kingsport div | 8 463 | 4 116 | 4 347 | 8 431 | 9 | 23 | 27.7 | 33.4 | 5.9 | 1 | 2 618 | 8 482 | 3.23 | 7 | 32 | 4.57 |
| Fordtown div | 8 353 | 4 150 | 4 203 | 8 344 | – | 9 | 28.1 | 36.4 | 4.6 | 6 | 2 543 | 8 347 | 3.28 | 1 | 9 | ... |
| Holston Valley div | 2 122 | 1 122 | 990 | 1 986 | 127 | 9 | 25.2 | 34.6 | 7.6 | 93 | 588 | 2 029 | 3.45 | 4 | 63 | ... |
| Indian Springs div | 5 947 | 2 899 | 3 048 | 5 937 | – | 10 | 26.9 | 36.3 | 6.0 | 6 | 1 765 | 5 939 | 3.36 | 2 | 10 | ... |
| Kingsport div | 31 708 | 14 753 | 16 955 | 30 194 | 1 472 | 42 | 31.8 | 30.9 | 8.7 | 244 | 10 605 | 31 464 | 2.97 | 454 | 1 508 | 3.32 |
| North Fork Holston div | 7 112 | 3 507 | 3 605 | 7 108 | 2 | 2 | 27.2 | 33.4 | 7.2 | – | 2 207 | 7 112 | 3.22 | ... | 4 | ... |
| Piney Flats div | 3 195 | 1 555 | 1 640 | 3 193 | – | 2 | 30.1 | 31.6 | 9.1 | – | 987 | 3 195 | 3.24 | ... | 2 | ... |
| Sullivan Gardens div | 7 325 | 3 620 | 3 705 | 7 322 | 2 | 1 | 27.1 | 34.2 | 6.3 | – | 2 222 | 7 325 | 3.30 | ... | 3 | ... |
| Weaver div | 6 179 | 3 122 | 3 057 | 6 078 | 95 | 6 | 27.1 | 36.6 | 7.6 | 56 | 1 750 | 6 123 | 3.50 | 33 | 101 | 3.06 |
| **SUMNER** | | | | | | | | | | | | | | | | |
| Bethpage div | 1 834 | 943 | 891 | 1 678 | 154 | 2 | 34.0 | 32.5 | 13.0 | – | 582 | 1 834 | 3.15 | 45 | 156 | 3.47 |
| Castalian Springs div | 1 141 | 559 | 582 | 868 | 273 | – | 35.4 | 31.6 | 16.0 | – | 374 | 1 141 | 3.05 | 83 | 273 | 3.29 |
| Gallatin div | 16 214 | 7 736 | 8 478 | 13 272 | 2 914 | 28 | 28.1 | 34.9 | 9.4 | 126 | 5 175 | 16 088 | 3.11 | 815 | 2 915 | 3.58 |
| Hendersonville div | 20 979 | 10 423 | 10 556 | 20 422 | 530 | 27 | 26.1 | 40.1 | 4.7 | 34 | 5 945 | 20 945 | 3.52 | 140 | 557 | 3.98 |
| Portland div | 7 895 | 3 858 | 4 037 | 7 617 | 271 | 7 | 31.6 | 33.4 | 13.0 | 28 | 2 575 | 7 867 | 3.06 | 74 | 278 | 3.76 |
| Westmoreland div | 4 515 | 2 279 | 2 236 | 4 515 | – | – | 29.4 | 34.3 | 11.9 | – | 1 410 | 4 515 | 3.20 | – | – | – |
| White House div | 3 528 | 1 769 | 1 759 | 3 447 | 78 | 3 | 29.1 | 34.6 | 11.3 | – | 1 080 | 3 528 | 3.27 | 24 | 81 | 3.38 |
| **TIPTON** | | | | | | | | | | | | | | | | |
| Atoka-Brighton div | 4 352 | 2 184 | 2 168 | 2 852 | 1 493 | 7 | 23.7 | 42.4 | 9.8 | 82 | 1 163 | 4 270 | 3.67 | 315 | 1 493 | 4.74 |
| Covington div | 9 360 | 4 513 | 4 847 | 6 312 | 3 045 | 3 | 28.0 | 37.9 | 11.7 | – | 2 845 | 9 360 | 3.29 | 768 | 3 048 | 3.97 |
| Drummonds div | 2 019 | 1 012 | 1 007 | 1 231 | 787 | 1 | 23.3 | 40.6 | 9.2 | – | 540 | 2 019 | 3.74 | 189 | 788 | 4.17 |
| Garland div | 2 098 | 1 044 | 1 054 | 2 012 | 86 | – | 32.2 | 32.7 | 10.5 | – | 670 | 2 098 | 3.13 | 27 | 86 | 3.19 |
| Mason div | 2 716 | 1 059 | 1 157 | 1 214 | 1 502 | – | 22.5 | 43.5 | 12.4 | 11 | 569 | 2 205 | 3.88 | 352 | 1 491 | 4.24 |
| Munford div | 6 057 | 3 005 | 3 052 | 4 889 | 1 149 | 19 | 23.4 | 40.1 | 6.8 | – | 1 718 | 6 057 | 3.53 | 254 | 1 168 | 4.60 |
| Tabernacle div | 1 899 | 947 | 952 | 877 | 1 022 | – | 21.8 | 44.9 | 9.6 | – | 472 | 1 899 | 4.02 | 204 | 1 022 | 5.01 |
| **TROUSDALE** | | | | | | | | | | | | | | | | |
| Hartsville div | 5 155 | 2 513 | 2 642 | 4 221 | 932 | 2 | 33.1 | 31.0 | 13.1 | 47 | 1 661 | 5 108 | 3.08 | 276 | 932 | 3.38 |
| **UNICOI** | | | | | | | | | | | | | | | | |
| Erwin div | 8 045 | 3 836 | 4 209 | 8 032 | 5 | 8 | 33.6 | 30.5 | 12.2 | 11 | 2 742 | 8 034 | 2.93 | 3 | 13 | ... |
| Flag Pond div | 2 798 | 1 391 | 1 407 | 2 793 | 2 | 3 | 28.8 | 35.5 | 11.2 | – | 816 | 2 798 | 3.43 | 1 | 5 | ... |
| Unicoi div | 4 411 | 2 194 | 2 217 | 4 409 | – | 2 | 27.8 | 35.6 | 9.0 | – | 1 311 | 4 411 | 3.36 | ... | 2 | ... |
| **UNION** | | | | | | | | | | | | | | | | |
| Luttrell div | 3 508 | 1 737 | 1 771 | 3 506 | – | 2 | 27.1 | 36.5 | 9.5 | – | 1 024 | 3 508 | 3.43 | ... | 2 | ... |
| Maynardville div | 4 392 | 2 182 | 2 210 | 4 390 | 1 | 1 | 27.5 | 36.1 | 10.1 | 24 | 1 286 | 4 368 | 3.40 | ... | 2 | ... |
| Sharps Chapel div | 1 172 | 581 | 591 | 1 172 | – | – | 29.2 | 34.4 | 13.5 | – | 337 | 1 172 | 3.48 | – | – | – |
| **VAN BUREN** | | | | | | | | | | | | | | | | |
| Spencer div | 3 758 | 1 861 | 1 897 | 3 747 | 10 | 1 | 28.5 | 33.2 | 10.3 | 5 | 1 157 | 3 753 | 3.24 | 7 | 11 | 1.57 |
| **WARREN** | | | | | | | | | | | | | | | | |
| Campaign div | 1 761 | 853 | 908 | 1 659 | 101 | 1 | 31.5 | 32.1 | 12.8 | – | 572 | 1 761 | 3.08 | 25 | 102 | 4.08 |
| Centertown div | 1 575 | 797 | 778 | 1 515 | 60 | – | 29.0 | 34.5 | 9.3 | 10 | 486 | 1 565 | 3.22 | 12 | 59 | 4.92 |
| Dibrell div | 3 614 | 1 806 | 1 808 | 3 527 | 87 | – | 30.0 | 33.7 | 10.1 | – | 1 131 | 3 614 | 3.20 | 27 | 87 | 3.22 |
| Irving College div | 1 269 | 644 | 625 | 1 260 | 9 | – | 28.3 | 33.4 | 11.7 | – | 400 | 1 269 | 3.17 | 3 | 9 | ... |
| McMinnville div | 15 743 | 7 514 | 8 229 | 14 921 | 816 | 6 | 28.7 | 34.0 | 11.1 | 96 | 5 129 | 15 647 | 3.05 | 236 | 816 | 3.46 |
| Morrison div | 3 010 | 1 514 | 1 496 | 2 867 | 143 | – | 32.4 | 32.8 | 12.2 | 21 | 951 | 2 989 | 3.14 | 42 | 143 | 3.40 |
| **WASHINGTON** | | | | | | | | | | | | | | | | |
| Bethesda div | 3 717 | 1 836 | 1 881 | 3 713 | – | 4 | 28.9 | 32.8 | 10.0 | 11 | 1 116 | 3 706 | 3.32 | ... | 4 | ... |
| Boone div | 8 197 | 4 109 | 4 088 | 8 187 | 4 | 11 | 26.7 | 34.2 | 6.0 | 34 | 2 542 | 8 163 | 3.21 | 3 | 15 | ... |
| Johnson City div | 33 770 | 16 825 | 16 945 | 31 217 | 2 492 | 61 | 30.4 | 28.0 | 12.3 | 3 332 | 10 101 | 30 438 | 3.01 | 677 | 2 394 | 3.54 |
| Johnson City North div | 4 175 | 2 044 | 2 131 | 4 133 | 40 | 2 | 26.6 | 34.6 | 8.9 | 84 | 1 212 | 4 091 | 3.38 | 8 | 42 | 5.25 |
| Johnson City South div | 9 196 | 4 632 | 4 564 | 9 148 | 19 | 29 | 25.2 | 32.5 | 6.6 | 13 | 2 925 | 9 183 | 3.14 | 10 | 48 | 4.80 |
| Jonesboro div | 4 827 | 2 356 | 2 466 | 4 631 | 185 | 6 | 31.4 | 30.8 | 11.9 | 139 | 1 513 | 4 683 | 3.10 | 51 | 184 | 3.61 |
| Sulphur Springs div | 4 824 | 2 393 | 2 431 | 4 821 | 2 | 1 | 30.8 | 31.0 | 9.9 | – | 1 516 | 4 824 | 3.18 | ... | 3 | ... |
| Telford div | 5 223 | 2 556 | 2 667 | 5 121 | 91 | 11 | 31.4 | 31.9 | 12.1 | 53 | 1 608 | 5 170 | 3.22 | 22 | 94 | 4.27 |
| **WAYNE** | | | | | | | | | | | | | | | | |
| Clifton Natural Bridge div | 2 439 | 1 168 | 1 271 | 2 306 | 133 | – | 31.5 | 32.6 | 12.4 | 1 | 806 | 2 438 | 3.02 | 42 | 132 | 3.14 |
| Collinwood div | 2 963 | 1 492 | 1 471 | 2 963 | – | – | 25.7 | 36.6 | 8.8 | 3 | 839 | 2 960 | 3.45 | – | – | – |
| Lutts-Cypress Inn div | 2 551 | 1 309 | 1 242 | 2 551 | – | – | 27.4 | 35.9 | 10.0 | – | 759 | 2 551 | 3.36 | – | – | – |
| Waynesboro div | 4 412 | 2 105 | 2 307 | 4 331 | 75 | 6 | 29.0 | 34.7 | 10.9 | 35 | 1 395 | 4 377 | 3.14 | 26 | 81 | 3.12 |
| **WEAKLEY** | | | | | | | | | | | | | | | | |
| Chestnut Glade-Dukedom div | 1 295 | 670 | 625 | 1 267 | 27 | 1 | 45.0 | 24.7 | 21.4 | – | 471 | 1 295 | 2.75 | 4 | 28 | ... |
| Dresden div | 4 666 | 2 189 | 2 477 | 4 377 | 279 | 10 | 38.0 | 28.4 | 18.9 | 171 | 1 582 | 4 495 | 2.84 | 80 | 282 | 3.53 |
| Gleason div | 3 911 | 1 930 | 1 981 | 3 809 | 100 | 2 | 34.0 | 30.5 | 15.2 | 7 | 1 303 | 3 904 | 3.00 | 29 | 102 | 3.52 |
| Greenfield div | 3 934 | 1 876 | 2 058 | 3 681 | 243 | 10 | 35.9 | 29.2 | 15.7 | – | 1 376 | 3 934 | 2.86 | 75 | 253 | 3.37 |
| Martin div | 11 246 | 5 638 | 5 608 | 10 271 | 924 | 51 | 23.6 | 22.7 | 10.7 | 2 049 | 3 344 | 9 197 | 2.75 | 258 | 835 | 3.24 |
| Palmersville div | 1 344 | 679 | 665 | 1 342 | 2 | – | 42.0 | 26.2 | 17.6 | – | 484 | 1 344 | 2.78 | ... | 2 | ... |
| Sharon div | 2 431 | 1 195 | 1 236 | 2 274 | 157 | – | 35.3 | 30.2 | 17.0 | – | 840 | 2 431 | 2.89 | 47 | 157 | 3.34 |
| **WHITE** | | | | | | | | | | | | | | | | |
| Bon De Croft div | 2 155 | 1 084 | 1 071 | 2 155 | – | – | 29.7 | 34.8 | 10.5 | – | 637 | 2 155 | 3.38 | – | – | – |
| Doyle div | 3 102 | 1 463 | 1 639 | 3 083 | 19 | – | 31.4 | 32.2 | 12.5 | 48 | 991 | 3 054 | 3.08 | 5 | 17 | 3.40 |
| Macedonia div | 2 592 | 1 287 | 1 305 | 2 591 | 1 | – | 30.3 | 32.4 | 10.6 | 1 | 818 | 2 591 | 3.17 | ... | 1 | ... |
| Shady Grove div | 2 045 | 979 | 1 066 | 2 037 | 8 | – | 30.4 | 32.2 | 11.1 | 3 | 641 | 2 042 | 3.19 | 2 | 8 | ... |
| Sparta div | 7 194 | 3 421 | 3 773 | 6 826 | 360 | 8 | 32.0 | 30.9 | 12.2 | 63 | 2 406 | 7 131 | 2.96 | 101 | 366 | 3.62 |
| **WILLIAMSON** | | | | | | | | | | | | | | | | |
| Bethesda div | 3 667 | 1 802 | 1 865 | 2 924 | 737 | 6 | 31.4 | 33.1 | 12.5 | 7 | 1 113 | 3 660 | 3.29 | 184 | 742 | 4.03 |
| Boston div | 2 335 | 1 202 | 1 133 | 2 202 | 128 | 5 | 27.0 | 35.6 | 9.6 | 39 | 641 | 2 296 | 3.58 | 23 | 119 | 5.17 |
| Brentwood div | 6 446 | 3 184 | 3 262 | 6 205 | 225 | 16 | 30.4 | 38.1 | 5.9 | 78 | 1 826 | 6 368 | 3.49 | 62 | 241 | 3.89 |
| Fairview div | 4 800 | 2 461 | 2 339 | 4 779 | 18 | 3 | 26.6 | 37.9 | 8.5 | – | 1 393 | 4 800 | 3.45 | 7 | 21 | 3.00 |
| Franklin div | 13 991 | 6 739 | 7 252 | 10 959 | 3 025 | 7 | 28.5 | 34.0 | 10.5 | 189 | 4 357 | 13 802 | 3.17 | 297 | 3 012 | 3.78 |
| Nolensville div | 3 091 | 1 494 | 1 597 | 2 430 | 657 | 4 | 29.1 | 36.5 | 10.8 | – | 902 | 3 091 | 3.43 | 156 | 661 | 4.24 |
| **WILSON** | | | | | | | | | | | | | | | | |
| Cedars div | 3 192 | 1 612 | 1 580 | 2 816 | 374 | 2 | 32.8 | 32.1 | 11.6 | – | 995 | 3 192 | 3.21 | 87 | 376 | 4.32 |
| Lebanon div | 17 287 | 8 180 | 9 107 | 14 888 | 2 374 | 25 | 28.6 | 34.0 | 10.7 | 272 | 5 549 | 17 015 | 3.07 | 701 | 2 384 | 3.40 |
| Martha-Laguardo div | 3 215 | 1 652 | 1 563 | 2 879 | 336 | – | 29.8 | 34.3 | 9.2 | – | 984 | 3 215 | 3.27 | 92 | 336 | 3.65 |
| Mount Juliet div | 6 287 | 3 171 | 3 116 | 5 843 | 441 | 4 | 26.2 | 38.4 | 5.0 | 4 | 1 815 | 6 283 | 3.46 | 107 | 445 | 4.16 |
| Northeast Wilson div | 3 298 | 1 651 | 1 647 | 3 020 | 272 | 6 | 31.0 | 33.0 | 11.5 | 29 | 1 019 | 3 269 | 3.21 | 76 | 278 | 3.66 |
| Watertown div | 3 720 | 1 789 | 1 931 | 3 378 | 342 | – | 37.2 | 29.2 | 16.3 | 4 | 1 304 | 3 716 | 2.85 | 106 | 342 | 3.23 |



## Table 34. Race by Sex, for Counties: 1970—Continued

(For meaning of symbols, see text)

| Counties | Total | White | Negro and other races | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| | | | Total | Negro | Other races | | | | |
| | | | | | Total | Indian | Japanese | Chinese | Filipino | All other |
| Pickett | 3 774 | 3 769 | 5 | 3 | 2 | – | 1 | – | – | 1 |
| Male | 1 874 | 1 871 | 3 | 2 | 1 | – | – | – | – | 1 |
| Female | 1 900 | 1 898 | 2 | 1 | 1 | – | 1 | – | – | – |
| Polk | 11 669 | 11 656 | 13 | 4 | 9 | 1 | 2 | 1 | 2 | 3 |
| Male | 5 697 | 5 688 | 9 | 3 | 6 | – | – | 1 | 2 | 3 |
| Female | 5 972 | 5 968 | 4 | 1 | 3 | 1 | 2 | – | – | – |
| Putnam | 35 487 | 34 845 | 642 | 480 | 162 | 35 | 9 | 54 | – | 64 |
| Male | 17 797 | 17 482 | 315 | 220 | 85 | 15 | 3 | 31 | – | 36 |
| Female | 17 690 | 17 363 | 327 | 260 | 77 | 20 | 6 | 23 | – | 28 |
| Rhea | 17 202 | 16 590 | 612 | 585 | 27 | 12 | 4 | 5 | 3 | 3 |
| Male | 8 307 | 8 021 | 286 | 277 | 9 | 3 | – | 1 | 3 | 2 |
| Female | 8 895 | 8 569 | 326 | 308 | 18 | 9 | 4 | 4 | – | 1 |
| Roane | 38 981 | 37 217 | 1 764 | 1 568 | 196 | 18 | 13 | 39 | 3 | 23 |
| Male | 18 762 | 18 013 | 749 | 703 | 46 | 1 | 7 | 22 | 2 | 14 |
| Female | 20 119 | 19 204 | 915 | 865 | 50 | 17 | 6 | 17 | 1 | 9 |
| Robertson | 29 102 | 24 451 | 4 651 | 4 625 | 26 | 5 | 6 | 2 | 4 | 9 |
| Male | 14 174 | 11 953 | 2 221 | 2 213 | 8 | – | 1 | – | 3 | 4 |
| Female | 14 928 | 12 498 | 2 430 | 2 412 | 18 | 5 | 5 | 2 | 1 | 5 |
| Rutherford | 59 428 | 52 172 | 7 256 | 7 135 | 121 | 31 | 19 | 6 | 5 | 60 |
| Male | 29 264 | 25 830 | 3 434 | 3 390 | 44 | 11 | 4 | 3 | 5 | 21 |
| Female | 30 164 | 26 342 | 3 822 | 3 745 | 77 | 20 | 15 | 3 | – | 39 |
| Scott | 14 762 | 14 750 | 12 | 1 | 11 | 7 | 1 | – | 1 | 2 |
| Male | 7 254 | 7 248 | 6 | – | 6 | 5 | – | – | – | 1 |
| Female | 7 508 | 7 502 | 6 | 1 | 5 | 2 | 1 | – | 1 | 1 |
| Sequatchie | 6 331 | 6 329 | 2 | 1 | 1 | 1 | – | – | – | – |
| Male | 3 143 | 3 143 | – | – | – | – | – | – | – | – |
| Female | 3 188 | 3 186 | 2 | 1 | 1 | 1 | – | – | – | – |
| Sevier | 28 241 | 28 095 | 146 | 133 | 13 | 7 | 4 | – | 1 | 1 |
| Male | 13 832 | 13 758 | 74 | 68 | 6 | 3 | 1 | – | 1 | 1 |
| Female | 14 409 | 14 337 | 72 | 65 | 7 | 4 | 3 | – | – | – |
| Shelby | 722 014 | 453 464 | 268 550 | 266 139 | 2 391 | 457 | 312 | 773 | 326 | 523 |
| Male | 346 603 | 221 096 | 125 507 | 124 264 | 1 243 | 227 | 100 | 421 | 199 | 296 |
| Female | 375 411 | 232 368 | 143 043 | 141 895 | 1 148 | 230 | 212 | 352 | 127 | 227 |
| Smith | 12 509 | 11 875 | 634 | 631 | 3 | 1 | 2 | – | – | – |
| Male | 6 157 | 5 866 | 291 | 290 | 1 | – | 1 | – | – | – |
| Female | 6 352 | 6 009 | 343 | 341 | 2 | 1 | 1 | – | – | – |
| Stewart | 7 319 | 7 135 | 184 | 171 | 13 | 3 | 4 | – | 2 | 4 |
| Male | 3 649 | 3 547 | 102 | 98 | 4 | 1 | 2 | – | 1 | – |
| Female | 3 670 | 3 588 | 82 | 73 | 9 | 2 | 2 | – | 1 | 4 |
| Sullivan | 127 329 | 124 714 | 2 615 | 2 432 | 183 | 64 | 25 | 26 | 12 | 56 |
| Male | 61 459 | 60 207 | 1 252 | 1 158 | 94 | 31 | 7 | 12 | 7 | 37 |
| Female | 65 870 | 64 507 | 1 363 | 1 274 | 89 | 33 | 18 | 14 | 5 | 19 |
| Sumner | 56 106 | 51 819 | 4 287 | 4 220 | 67 | 12 | 7 | 2 | 8 | 38 |
| Male | 27 567 | 25 533 | 2 034 | 2 005 | 29 | 6 | 3 | 1 | 3 | 16 |
| Female | 28 539 | 26 286 | 2 253 | 2 215 | 38 | 6 | 4 | 1 | 5 | 22 |
| Tipton | 28 001 | 18 887 | 9 114 | 9 084 | 30 | 11 | 10 | 1 | – | 8 |
| Male | 13 764 | 9 348 | 4 416 | 4 404 | 12 | 8 | – | 1 | – | 3 |
| Female | 14 237 | 9 539 | 4 698 | 4 680 | 18 | 3 | 10 | – | – | 5 |
| Trousdale | 5 155 | 4 221 | 934 | 932 | 2 | – | 1 | – | – | 1 |
| Male | 2 513 | 2 068 | 445 | 444 | 1 | – | – | – | – | 1 |
| Female | 2 642 | 2 153 | 489 | 488 | 1 | – | 1 | – | – | – |
| Unicoi | 15 254 | 15 234 | 20 | 7 | 13 | 6 | 2 | – | – | 5 |
| Male | 7 421 | 7 415 | 6 | 3 | 3 | 2 | – | – | – | 1 |
| Female | 7 833 | 7 819 | 14 | 4 | 10 | 4 | 2 | – | – | 4 |
| Union | 9 072 | 9 068 | 4 | 1 | 3 | 1 | 2 | – | – | – |
| Male | 4 500 | 4 499 | 1 | – | 1 | – | 1 | – | – | – |
| Female | 4 572 | 4 569 | 3 | 1 | 2 | 1 | 1 | – | – | – |
| Van Buren | 3 758 | 3 747 | 11 | 10 | 1 | 1 | – | – | – | – |
| Male | 1 861 | 1 856 | 5 | 4 | 1 | 1 | – | – | – | – |
| Female | 1 897 | 1 891 | 6 | 6 | – | – | – | – | – | – |
| Warren | 26 972 | 25 749 | 1 223 | 1 216 | 7 | 4 | 1 | – | – | 2 |
| Male | 13 128 | 12 539 | 589 | 587 | 2 | 1 | – | – | – | 1 |
| Female | 13 844 | 13 210 | 634 | 629 | 5 | 3 | 1 | – | – | 1 |
| Washington | 73 924 | 70 966 | 2 958 | 2 833 | 125 | 41 | 20 | 16 | 2 | 46 |
| Male | 36 751 | 35 325 | 1 426 | 1 366 | 60 | 11 | 6 | 12 | 1 | 30 |
| Female | 37 173 | 35 641 | 1 532 | 1 467 | 65 | 30 | 14 | 4 | 1 | 16 |
| Wayne | 12 365 | 12 151 | 214 | 208 | 6 | 2 | 2 | – | 1 | 1 |
| Male | 6 074 | 5 980 | 94 | 92 | 2 | 1 | – | – | 1 | – |
| Female | 6 291 | 6 171 | 120 | 116 | 4 | 1 | 2 | – | – | 1 |
| Weakley | 28 827 | 27 021 | 1 806 | 1 732 | 74 | 14 | 2 | 16 | – | 42 |
| Male | 14 177 | 13 356 | 821 | 778 | 43 | 9 | 1 | 9 | – | 24 |
| Female | 14 650 | 13 665 | 985 | 954 | 31 | 5 | 1 | 7 | – | 18 |
| White | 17 088 | 16 692 | 396 | 388 | 8 | 4 | 1 | – | – | 1 |
| Male | 8 234 | 8 048 | 186 | 181 | 5 | 4 | – | – | – | 1 |
| Female | 8 854 | 8 644 | 210 | 207 | 3 | 2 | 1 | – | – | – |
| Williamson | 34 330 | 29 499 | 4 831 | 4 790 | 41 | 14 | 12 | 2 | 3 | 10 |
| Male | 16 682 | 14 538 | 2 344 | 2 328 | 16 | 4 | 4 | 1 | 3 | 4 |
| Female | 17 648 | 14 961 | 2 687 | 2 462 | 25 | 10 | 8 | 1 | – | 6 |
| Wilson | 36 999 | 32 823 | 4 176 | 4 139 | 37 | 24 | 4 | 1 | 2 | 6 |
| Male | 18 055 | 16 082 | 1 973 | 1 958 | 15 | 9 | 2 | 1 | – | 3 |
| Female | 18 944 | 16 741 | 2 203 | 2 181 | 22 | 15 | 2 | – | 2 | 3 |

## Table 35. Age by Race and Sex, for Counties: 1970—Continued

(For minimum base for derived figures (percent, median, etc.) and meaning of symbols, see text)

| Counties | 1970 population: All races Total | All races Male | All races Female | White Male | White Female | Negro Male | Negro Female | 1960 population | 1970 population: All races Total | All races Male | All races Female | White Male | White Female | Negro Male | Negro Female | 1960 population |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | STEWART | | | | | | | | SULLIVAN | | | | | | | |
| All ages | 7 319 | 3 649 | 3 670 | 3 547 | 3 586 | 98 | 73 | 7 851 | 137 229 | 61 459 | 65 870 | 60 907 | 64 587 | 1 158 | 1 374 | 114 139 |
| Under 1 year | 89 | 41 | 48 | 41 | 47 | – | – | 145 | 2 250 | 1 146 | 1 104 | 1 116 | 1 083 | 27 | 16 | 2 413 |
| 1 year | 102 | 55 | 47 | 55 | 47 | – | – | 154 | 2 236 | 1 123 | 1 113 | 1 102 | 1 087 | 20 | 26 | 2 401 |
| 2 years | 92 | 47 | 45 | 47 | 45 | – | – | 153 | 2 197 | 1 094 | 1 103 | 1 076 | 1 073 | 17 | 28 | 2 468 |
| 3 years | 126 | 58 | 68 | 57 | 66 | 1 | 2 | 135 | 2 258 | 1 104 | 1 154 | 1 083 | 1 139 | 16 | 14 | 2 498 |
| 4 years | 107 | 58 | 49 | 55 | 59 | 3 | – | 147 | 2 153 | 1 124 | 1 029 | 1 106 | 1 010 | 18 | 15 | 2 435 |
| 5 years | 119 | 54 | 65 | 54 | 63 | – | 2 | 149 | 2 344 | 1 176 | 1 168 | 1 155 | 1 148 | 20 | 17 | 2 546 |
| 6 years | 115 | 62 | 53 | 57 | 51 | 5 | 2 | 160 | 2 286 | 1 173 | 1 113 | 1 147 | 1 087 | 22 | 25 | 2 451 |
| 7 years | 110 | 67 | 43 | 64 | 41 | 3 | 2 | 167 | 2 346 | 1 221 | 1 125 | 1 200 | 1 097 | 19 | 27 | 2 506 |
| 8 years | 106 | 46 | 60 | 43 | 57 | 3 | 3 | 144 | 2 419 | 1 241 | 1 178 | 1 209 | 1 151 | 30 | 24 | 2 438 |
| 9 years | 115 | 65 | 50 | 61 | 47 | 4 | 3 | 164 | 2 395 | 1 219 | 1 176 | 1 188 | 1 150 | 29 | 25 | 2 321 |
| 10 years | 150 | 79 | 71 | 74 | 68 | 5 | 3 | 133 | 2 504 | 1 272 | 1 232 | 1 247 | 1 198 | 25 | 31 | 2 352 |
| 11 years | 137 | 70 | 67 | 67 | 67 | 3 | – | 162 | 2 284 | 1 161 | 1 123 | 1 144 | 1 084 | 15 | 39 | 2 384 |
| 12 years | 151 | 67 | 84 | 67 | 80 | – | 4 | 158 | 2 427 | 1 252 | 1 175 | 1 232 | 1 141 | 20 | 34 | 2 631 |
| 13 years | 135 | 72 | 63 | 71 | 63 | 1 | – | 181 | 2 461 | 1 241 | 1 220 | 1 217 | 1 193 | 23 | 27 | 2 557 |
| 14 years | 153 | 81 | 72 | 76 | 71 | 5 | 1 | 151 | 2 446 | 1 316 | 1 130 | 1 291 | 1 100 | 24 | 25 | 1 899 |
| 15 years | 148 | 70 | 78 | 64 | 77 | 5 | 1 | 156 | 2 436 | 1 263 | 1 173 | 1 235 | 1 139 | 28 | 33 | 2 009 |
| 16 years | 136 | 74 | 62 | 71 | 62 | 3 | – | 175 | 2 385 | 1 225 | 1 160 | 1 184 | 1 124 | 40 | 36 | 2 098 |
| 17 years | 138 | 79 | 59 | 79 | 57 | – | 2 | 147 | 2 396 | 1 277 | 1 119 | 1 201 | 1 090 | 75 | 29 | 2 067 |
| 18 years | 112 | 56 | 56 | 55 | 53 | 1 | 3 | 108 | 2 128 | 1 084 | 1 044 | 1 013 | 1 022 | 68 | 20 | 1 718 |
| 19 years | 107 | 55 | 52 | 52 | 52 | 3 | – | 87 | 1 792 | 859 | 933 | 819 | 913 | 37 | 20 | 1 444 |
| 20 years | 98 | 47 | 51 | 45 | 50 | 2 | 1 | 88 | 1 892 | 828 | 1 064 | 794 | 1 040 | 32 | 23 | 1 384 |
| 21 years and over | 4 773 | 2 346 | 2 427 | 2 292 | 2 375 | 51 | 44 | 4 787 | 79 294 | 37 060 | 42 234 | 36 448 | 41 438 | 553 | 740 | 67 121 |
| Under 5 years | 516 | 259 | 257 | 255 | 254 | 4 | 2 | 734 | 11 094 | 5 591 | 5 503 | 5 483 | 5 392 | 98 | 99 | 12 215 |
| 5 to 9 years | 565 | 294 | 271 | 279 | 259 | 15 | 12 | 784 | 11 790 | 6 030 | 5 760 | 5 899 | 5 633 | 120 | 118 | 12 260 |
| 10 to 14 years | 726 | 369 | 357 | 355 | 349 | 14 | 8 | 785 | 12 122 | 6 242 | 5 880 | 6 131 | 5 716 | 107 | 156 | 11 823 |
| 15 to 19 years | 641 | 334 | 307 | 321 | 301 | 12 | 6 | 673 | 11 137 | 5 708 | 5 429 | 5 452 | 5 288 | 248 | 138 | 9 336 |
| 20 to 24 years | 489 | 271 | 218 | 267 | 213 | 4 | 3 | 407 | 9 890 | 4 359 | 5 531 | 4 244 | 5 416 | 98 | 105 | 7 341 |
| 25 to 29 years | 392 | 202 | 190 | 199 | 188 | 3 | 2 | 379 | 9 933 | 4 923 | 5 010 | 4 862 | 4 943 | 52 | 60 | 7 896 |
| 30 to 34 years | 327 | 132 | 195 | 129 | 188 | 2 | 6 | 409 | 8 432 | 4 118 | 4 314 | 4 078 | 4 246 | 34 | 59 | 8 766 |
| 35 to 39 years | 384 | 176 | 208 | 171 | 200 | 5 | 8 | 469 | 7 883 | 3 730 | 4 153 | 3 675 | 4 077 | 50 | 67 | 9 232 |
| 40 to 44 years | 438 | 206 | 232 | 196 | 226 | 10 | 3 | 429 | 8 299 | 3 935 | 4 364 | 3 905 | 4 262 | 46 | 77 | 7 693 |
| 45 to 49 years | 498 | 267 | 231 | 259 | 224 | 8 | 7 | 481 | 8 490 | 4 016 | 4 474 | 3 954 | 4 397 | 59 | 75 | 6 916 |
| 50 to 54 years | 450 | 217 | 233 | 213 | 229 | 4 | 4 | 481 | 7 193 | 3 457 | 3 736 | 3 374 | 3 657 | 79 | 74 | 5 719 |
| 55 to 59 years | 455 | 220 | 235 | 219 | 232 | 1 | 3 | 434 | 6 137 | 2 946 | 3 191 | 2 891 | 3 120 | 53 | 69 | 4 364 |
| 60 to 64 years | 426 | 198 | 228 | 192 | 227 | 6 | 1 | 359 | 5 032 | 2 347 | 2 685 | 2 316 | 2 644 | 28 | 39 | 3 520 |
| 65 to 69 years | 339 | 175 | 164 | 172 | 158 | 2 | 5 | 377 | 3 675 | 1 567 | 2 108 | 1 541 | 2 055 | 26 | 51 | 2 680 |
| 70 to 74 years | 282 | 138 | 144 | 137 | 144 | – | – | 298 | 2 729 | 1 168 | 1 561 | 1 141 | 1 520 | 25 | 39 | 2 057 |
| 75 to 79 years | 195 | 91 | 104 | 86 | 102 | 5 | 2 | 198 | 1 732 | 675 | 1 057 | 654 | 1 028 | 18 | 28 | 1 285 |
| 80 to 84 years | 124 | 65 | 59 | 65 | 59 | – | – | 96 | 1 058 | 380 | 678 | 364 | 664 | 15 | 13 | 677 |
| 85 years and over | 72 | 35 | 37 | 32 | 35 | 3 | 1 | 58 | 703 | 247 | 456 | 243 | 449 | 7 | 7 | 359 |
| Under 18 years | 2 229 | 1 145 | 1 084 | 1 103 | 1 058 | 41 | 25 | 2 781 | 42 223 | 21 628 | 20 595 | 21 133 | 20 094 | 468 | 471 | 42 472 |
| 62 years and over | 1 258 | 616 | 642 | 599 | 632 | 15 | 8 | 1 242 | 12 725 | 5 311 | 7 414 | 5 204 | 7 244 | 97 | 163 | 9 170 |
| 65 years and over | 1 012 | 504 | 508 | 492 | 498 | 10 | 8 | 1 027 | 9 897 | 4 037 | 5 860 | 3 943 | 5 716 | 86 | 138 | 7 058 |
| Median age | 35.0 | 33.6 | 36.0 | 33.8 | 36.1 | 25.0 | 32.9 | 32.0 | 28.8 | 27.8 | 29.8 | 28.0 | 29.9 | 20.3 | 26.8 | 27.6 |
| | SUMNER | | | | | | | | TIPTON | | | | | | | |
| All ages | 56 106 | 27 567 | 28 539 | 25 533 | 26 386 | 2 085 | 2 215 | 36 217 | 28 001 | 13 764 | 14 237 | 9 348 | 9 539 | 4 604 | 4 680 | 28 564 |
| Under 1 year | 1 046 | 540 | 506 | 502 | 465 | 38 | 40 | 740 | 557 | 291 | 266 | 181 | 177 | 110 | 89 | 756 |
| 1 year | 960 | 487 | 473 | 455 | 436 | 32 | 36 | 753 | 503 | 261 | 242 | 186 | 152 | 75 | 90 | 754 |
| 2 years | 967 | 480 | 487 | 446 | 452 | 34 | 34 | 705 | 499 | 268 | 231 | 172 | 136 | 95 | 95 | 764 |
| 3 years | 1 002 | 522 | 480 | 480 | 436 | 40 | 44 | 737 | 547 | 274 | 273 | 161 | 174 | 112 | 99 | 775 |
| 4 years | 1 102 | 552 | 550 | 512 | 495 | 40 | 55 | 752 | 569 | 287 | 282 | 180 | 159 | 107 | 123 | 694 |
| 5 years | 1 234 | 630 | 604 | 568 | 552 | 61 | 52 | 760 | 607 | 326 | 281 | 201 | 165 | 125 | 115 | 787 |
| 6 years | 1 288 | 664 | 624 | 603 | 582 | 60 | 41 | 796 | 673 | 365 | 308 | 219 | 176 | 145 | 132 | 722 |
| 7 years | 1 249 | 617 | 632 | 574 | 583 | 43 | 49 | 797 | 664 | 336 | 328 | 198 | 187 | 137 | 141 | 691 |
| 8 years | 1 217 | 621 | 596 | 575 | 533 | 46 | 63 | 736 | 669 | 347 | 322 | 208 | 198 | 139 | 124 | 700 |
| 9 years | 1 202 | 618 | 584 | 561 | 533 | 57 | 51 | 725 | 643 | 336 | 307 | 213 | 174 | 123 | 133 | 708 |
| 10 years | 1 260 | 630 | 630 | 568 | 583 | 61 | 47 | 723 | 690 | 369 | 321 | 223 | 197 | 146 | 124 | 709 |
| 11 years | 1 241 | 669 | 572 | 611 | 528 | 58 | 44 | 741 | 608 | 319 | 289 | 185 | 167 | 134 | 122 | 689 |
| 12 years | 1 163 | 574 | 589 | 544 | 536 | 29 | 53 | 806 | 694 | 360 | 334 | 212 | 197 | 148 | 136 | 730 |
| 13 years | 1 134 | 553 | 581 | 504 | 542 | 49 | 38 | 757 | 697 | 333 | 364 | 193 | 215 | 140 | 149 | 673 |
| 14 years | 1 122 | 587 | 536 | 531 | 482 | 56 | 54 | 647 | 63- | 322 | 309 | 181 | 17b | 141 | 131 | 568 |
| 15 years | 1 135 | 616 | 519 | 555 | 478 | 60 | 41 | 630 | 667 | 356 | 311 | 219 | 170 | 137 | 141 | 584 |
| 16 years | 1 082 | 565 | 517 | 516 | 465 | 49 | 52 | 654 | 622 | 331 | 291 | 182 | 179 | 148 | 112 | 618 |
| 17 years | 1 036 | 533 | 503 | 484 | 459 | 49 | 43 | 638 | 609 | 314 | 295 | 195 | 166 | 119 | 129 | 585 |
| 18 years | 786 | 371 | 395 | 344 | 345 | 26 | 49 | 491 | 510 | 250 | 260 | 147 | 177 | 103 | 83 | 473 |
| 19 years | 695 | 336 | 359 | 293 | 322 | 43 | 36 | 423 | 439 | 203 | 236 | 125 | 166 | 78 | 70 | 335 |
| 20 years | 652 | 277 | 376 | 253 | 337 | 24 | 39 | 430 | 392 | 182 | 210 | 143 | 146 | 39 | 63 | 337 |
| 21 years and over | 33 551 | 16 125 | 17 426 | 15 054 | 16 142 | 1 050 | 1 254 | 21 776 | 15 511 | 7 334 | 8 177 | 5 424 | 5 883 | 1 903 | 2 279 | 14 912 |
| Under 5 years | 5 077 | 2 581 | 2 496 | 2 395 | 2 284 | 184 | 209 | 3 687 | 2 675 | 1 381 | 1 294 | 880 | 798 | 499 | 496 | 3 743 |
| 5 to 9 years | 6 190 | 3 150 | 3 040 | 2 881 | 2 783 | 267 | 256 | 3 814 | 3 256 | 1 710 | 1 546 | 1 039 | 900 | 669 | 645 | 3 608 |
| 10 to 14 years | 5 921 | 3 013 | 2 908 | 2 758 | 2 671 | 253 | 236 | 3 674 | 3 320 | 1 703 | 1 617 | 994 | 954 | 709 | 662 | 3 369 |
| 15 to 19 years | 4 716 | 2 421 | 2 295 | 2 192 | 2 069 | 227 | 221 | 2 836 | 2 847 | 1 454 | 1 393 | 868 | 858 | 585 | 535 | 2 595 |
| 20 to 24 years | 3 607 | 1 596 | 2 011 | 1 459 | 1 839 | 136 | 165 | 1 951 | 1 884 | 863 | 1 021 | 687 | 766 | 175 | 251 | 1 684 |
| 25 to 29 years | 4 342 | 2 106 | 2 236 | 1 987 | 2 116 | 116 | 115 | 1 912 | 1 699 | 815 | 884 | 679 | 693 | 133 | 187 | 1 468 |
| 30 to 34 years | 3 931 | 1 940 | 1 991 | 1 830 | 1 869 | 106 | 120 | 2 209 | 1 493 | 739 | 754 | 607 | 579 | 130 | 174 | 1 497 |
| 35 to 39 years | 3 499 | 1 748 | 1 751 | 1 673 | 1 642 | 71 | 103 | 2 406 | 1 393 | 672 | 721 | 539 | 534 | 132 | 183 | 1 503 |
| 40 to 44 years | 3 218 | 1 602 | 1 616 | 1 526 | 1 494 | 72 | 119 | 2 400 | 1 336 | 651 | 685 | 484 | 461 | 167 | 224 | 1 496 |
| 45 to 49 years | 3 101 | 1 519 | 1 582 | 1 431 | 1 477 | 87 | 102 | 2 349 | 1 335 | 622 | 713 | 460 | 503 | 162 | 209 | 1 630 |
| 50 to 54 years | 2 916 | 1 422 | 1 494 | 1 326 | 1 374 | 95 | 119 | 2 063 | 1 312 | 622 | 690 | 416 | 498 | 206 | 191 | 1 438 |
| 55 to 59 years | 2 525 | 1 216 | 1 309 | 1 104 | 1 190 | 112 | 119 | 1 726 | 1 412 | 685 | 727 | 486 | 499 | 199 | 228 | 1 168 |
| 60 to 64 years | 2 169 | 1 048 | 1 121 | 970 | 1 026 | 77 | 95 | 1 447 | 1 243 | 604 | 639 | 419 | 434 | 185 | 204 | 1 003 |
| 65 to 69 years | 1 744 | 809 | 935 | 731 | 848 | 78 | 85 | 1 376 | 1 033 | 486 | 547 | 311 | 364 | 175 | 183 | 827 |
| 70 to 74 years | 1 331 | 605 | 726 | 557 | 673 | 47 | 52 | 1 029 | 755 | 334 | 421 | 214 | 291 | 120 | 130 | 690 |
| 75 to 79 years | 940 | 399 | 541 | 361 | 496 | 38 | 45 | 718 | 490 | 212 | 278 | 130 | 201 | 82 | 77 | 461 |
| 80 to 84 years | 540 | 248 | 292 | 231 | 360 | 17 | 32 | 385 | 324 | 141 | 183 | 92 | 126 | 49 | 57 | 233 |
| 85 years and over | 341 | 144 | 197 | 121 | 175 | 22 | 22 | 235 | 194 | 70 | 124 | 43 | 80 | 27 | 44 | 151 |
| Under 18 years | 20 441 | 10 458 | 9 983 | 9 589 | 9 140 | 862 | 837 | 13 097 | 11 149 | 5 795 | 5 354 | 3 509 | 3 167 | 2 281 | 2 185 | 12 507 |
| 62 years and over | 6 109 | 2 775 | 3 334 | 2 527 | 3 040 | 245 | 291 | 4 611 | 3 486 | 1 577 | 1 909 | 1 011 | 1 304 | 566 | 604 | 2 963 |
| 65 years and over | 4 896 | 2 205 | 2 691 | 2 001 | 2 452 | 202 | 236 | 3 743 | 2 796 | 1 243 | 1 553 | 790 | 1 062 | 453 | 491 | 2 362 |
| Median age | 27.9 | 27.4 | 28.4 | 27.7 | 28.5 | 22.6 | 25.9 | 30.5 | 25.1 | 23.7 | 26.4 | 26.5 | 28.6 | 17.8 | 20.0 | 22.9 |







## Table 36. Household Relationship, Type of Family, and Race, for Counties: 1970—Continued

(For minimum base for derived figures (percent, median, etc.) and meaning of symbols, see text)

| Counties | Sumner | Tipton | Trousdale | Unicoi | Union | Van Buren | Warren | Washington | Wayne | Weakley | White | Williamson | Wilson |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| RELATIONSHIP TO HEAD OF HOUSEHOLD | | | | | | | | | | | | | |
| Total, all persons | 56 106 | 28 001 | 5 135 | 15 234 | 9 672 | 3 758 | 36 972 | 73 924 | 12 363 | 28 827 | 17 [illegible] | 24 226 | 36 999 |
| In households | 55 918 | 27 908 | 5 108 | 15 243 | 9 648 | 3 753 | 36 845 | 73 828 | 12 226 | 26 688 | 16 970 | 24 017 | 36 698 |
| Head | 17 141 | 7 977 | 1 661 | 4 869 | 2 647 | | 8 669 | 22 533 | 3 819 | 9 400 | 5 490 | 10 732 | 11 666 |
| 14 to 24 years | 1 136 | 371 | 120 | 278 | 158 | 109 | 648 | 2 114 | 271 | 856 | 353 | 591 | 743 |
| 25 to 34 years | 3 842 | 1 424 | 226 | 804 | 541 | 189 | 1 616 | 4 226 | 691 | 1 823 | 884 | 2 034 | 2 323 |
| 35 to 44 years | 3 420 | 1 319 | 264 | 898 | 454 | 179 | 1 509 | 3 903 | 595 | 1 586 | 884 | 2 101 | 2 056 |
| 45 to 64 years | 5 793 | 2 859 | 633 | 1 767 | 898 | 441 | 3 018 | 8 005 | 1 453 | 3 321 | 2 118 | 3 389 | 4 249 |
| 65 years and over | 2 950 | 1 804 | 418 | 1 122 | 596 | 239 | 1 878 | 4 285 | 809 | 2 614 | 1 289 | 1 917 | 2 297 |
| Primary individual: Male | 688 | 436 | 82 | 169 | 90 | 48 | 361 | 1 228 | 178 | 546 | 195 | 386 | 503 |
| Female | 1 252 | 755 | 158 | 480 | 200 | 83 | 877 | 2 352 | 337 | 1 116 | 540 | 796 | 1 098 |
| Family head: Male | 14 021 | 6 082 | 1 256 | 3 760 | 2 150 | 939 | 6 760 | 16 726 | 3 007 | 7 139 | 4 269 | 8 271 | 9 163 |
| Female | 1 180 | 704 | 165 | 460 | 207 | 87 | 671 | 2 229 | 297 | 599 | 489 | 779 | 902 |
| Wife of head | 13 718 | 5 853 | 1 212 | 3 628 | 2 069 | 908 | 6 573 | 16 238 | 2 925 | 6 937 | 4 137 | 7 997 | 8 870 |
| Child of head | 21 803 | 11 580 | 1 834 | 5 801 | 3 730 | 1 487 | 10 081 | 26 471 | 4 967 | 8 846 | 6 311 | 13 309 | 13 841 |
| Other relative of head | 2 835 | 2 208 | 369 | 858 | 550 | 191 | 1 367 | 3 907 | 548 | 1 278 | 950 | 1 953 | 1 980 |
| Not related to head | 431 | 290 | 32 | 87 | 52 | 10 | 157 | 1 109 | 67 | 339 | 82 | 326 | 333 |
| In group quarters | 188 | 93 | 27 | 11 | 26 | 5 | 127 | 3 666 | 89 | 2 227 | 113 | 313 | 309 |
| Inmate of institution | 155 | 89 | 47 | 11 | 24 | 5 | 112 | 2 107 | 35 | 171 | 109 | 260 | 143 |
| Other | 33 | 4 | – | – | 2 | – | 15 | 1 559 | 4 | 2 056 | 4 | 53 | 166 |
| Persons per household | 3.26 | 3.50 | 3.08 | 3.13 | 3.42 | 3.24 | 3.10 | 3.12 | 3.23 | 2.83 | 3.09 | 3.32 | 3.15 |
| White, all persons | 51 819 | 28 887 | 4 221 | 15 234 | 9 068 | 3 747 | 35 749 | 70 966 | 12 151 | 27 921 | 16 692 | 24 499 | 32 822 |
| In households | 51 658 | 28 812 | 4 176 | 15 223 | 9 044 | 3 742 | 35 639 | 67 474 | 12 113 | 26 941 | 16 581 | 24 221 | 32 529 |
| Head | 15 960 | 5 868 | 1 385 | 4 865 | 2 645 | 1 150 | 8 324 | 21 762 | 3 751 | 8 906 | 5 384 | 9 003 | 10 497 |
| 14 to 24 years | 1 076 | 499 | 101 | 278 | 158 | 109 | 634 | 2 071 | 270 | 830 | 350 | 535 | 685 |
| 25 to 34 years | 3 634 | 1 179 | 195 | 803 | 541 | 189 | 1 544 | 4 117 | 689 | 1 772 | 893 | 1 842 | 2 113 |
| 35 to 44 years | 3 245 | 998 | 208 | 898 | 454 | 177 | 1 453 | 3 798 | 587 | 1 514 | 869 | 1 886 | 1 867 |
| 45 to 64 years | 5 334 | 1 986 | 531 | 1 766 | 897 | 440 | 2 904 | 7 726 | 1 425 | 3 120 | 2 071 | 3 117 | 3 791 |
| 65 years and over | 2 671 | 1 206 | 350 | 1 920 | 595 | 235 | 1 789 | 4 062 | 780 | 2 470 | 1 199 | 1 623 | 2 041 |
| Primary individual: Male | 595 | 234 | 60 | 169 | 90 | 47 | 327 | 1 158 | 176 | 498 | 188 | 296 | 406 |
| Female | 1 122 | 539 | 141 | 480 | 200 | 81 | 841 | 2 225 | 316 | 1 041 | 532 | 695 | 976 |
| Family head: Male | 13 275 | 4 719 | 1 071 | 3 756 | 2 149 | 935 | 6 549 | 16 329 | 2 975 | 6 877 | 4 200 | 7 482 | 8 414 |
| Female | 968 | 376 | 113 | 460 | 206 | 87 | 607 | 2 050 | 284 | 690 | 454 | 530 | 701 |
| Wife of head | 13 002 | 5 385 | 1 041 | 3 621 | 2 067 | 905 | 6 369 | 15 857 | 2 892 | 6 690 | 4 072 | 7 270 | 8 174 |
| Child of head | 19 999 | 7 [illegible] | 1 456 | 5 794 | 3 730 | 1 486 | 9 535 | 25 272 | 4 877 | 8 012 | 6 162 | 11 356 | 12 038 |
| Other relative of head | 2 344 | 865 | 270 | 857 | 550 | 191 | 1 256 | 3 577 | 528 | 1 029 | 893 | 1 355 | 1 565 |
| Not related to head | 353 | 149 | 24 | 86 | 52 | 10 | 145 | 1 006 | 65 | 304 | 70 | 237 | 255 |
| In group quarters | 161 | 75 | 45 | 11 | 24 | 5 | 198 | 3 492 | 38 | 2 080 | 111 | 278 | 294 |
| Inmate of institution | 134 | – | 45 | 11 | 2 | – | 106 | 1 988 | 35 | 164 | 105 | 240 | 132 |
| Other | 27 | 75 | – | – | 22 | 5 | 14 | 1 504 | 3 | 1 916 | 6 | 38 | 162 |
| Persons per household | 3.24 | 3.21 | 3.02 | 3.13 | 3.42 | 3.25 | 3.08 | 3.10 | 3.23 | 2.80 | 3.08 | 3.25 | 3.10 |
| Negro, all persons | 4 220 | 9 066 | 933 | 7 | 1 | 10 | 1 216 | 2 833 | 388 | 1 732 | 388 | 4 790 | 4 139 |
| In households | 4 193 | 9 066 | 930 | 7 | … | 10 | 1 209 | 2 673 | 387 | 1 597 | 384 | 4 757 | 4 125 |
| Head | 1 160 | 2 106 | 275 | 3 | … | 6 | 343 | 736 | 64 | 479 | 108 | 1 215 | 1 155 |
| 14 to 24 years | 58 | 71 | 19 | – | … | – | 14 | 40 | 1 | 23 | 5 | 54 | 57 |
| 25 to 34 years | 202 | 244 | 31 | – | … | – | 72 | 100 | 2 | 48 | 19 | 191 | 203 |
| 35 to 44 years | 167 | 320 | 56 | – | … | 1 | 56 | 112 | 6 | 65 | 15 | 213 | 187 |
| 45 to 64 years | 455 | 873 | 102 | 1 | … | 1 | 113 | 270 | 27 | 199 | 39 | 469 | 454 |
| 65 years and over | 278 | 598 | 67 | 2 | … | 4 | 88 | 214 | 28 | 144 | 30 | 288 | 254 |
| Primary individual: Male | 92 | 202 | 22 | – | … | 1 | 34 | 62 | 2 | 45 | 7 | 87 | 96 |
| Female | 129 | 216 | 17 | – | … | 2 | 36 | 120 | 19 | 75 | 8 | 96 | 117 |
| Family head: Male | 728 | 1 360 | 184 | 3 | … | 3 | 209 | 384 | 30 | 252 | 68 | 283 | 741 |
| Female | 211 | 328 | 52 | – | … | – | 61 | 178 | 13 | 107 | 25 | 249 | 201 |
| Wife of head | 689 | 1 255 | 171 | 3 | … | 3 | 198 | 358 | 31 | 235 | 63 | 719 | 688 |
| Child of head | 1 790 | 4 327 | 378 | 1 | … | 1 | 546 | 1 166 | 90 | 606 | 145 | 2 140 | 1 791 |
| Other relative of head | 487 | 1 240 | 98 | – | … | – | 110 | 320 | 20 | 247 | 57 | 596 | 414 |
| Not related to head | 67 | 138 | 8 | – | … | – | 12 | 93 | 2 | 30 | 11 | 87 | 77 |
| In group quarters | 27 | 18 | 2 | – | … | – | 7 | 160 | 1 | 135 | 6 | 33 | 14 |
| Inmate of institution | 21 | 4 | 2 | – | … | – | 6 | 117 | – | 7 | 4 | 18 | 11 |
| Other | 6 | 14 | – | – | … | – | 1 | 43 | 1 | 128 | – | 15 | 3 |
| Persons per household | 3.61 | 4.30 | 3.38 | … | … | 1.67 | 3.52 | 3.63 | 3.23 | 3.33 | 3.56 | 3.92 | 3.57 |
| FAMILIES BY NUMBER OF OWN CHILDREN UNDER 18 YEARS | | | | | | | | | | | | | |
| Total, all families | 15 381 | 6 786 | 1 421 | 4 230 | 2 337 | 1 036 | 7 431 | 18 935 | 3 304 | 7 738 | 4 738 | 9 050 | 10 065 |
| With own children under 18 years | 8 798 | 3 797 | 693 | 2 198 | 1 296 | 542 | 3 990 | 9 879 | 1 874 | 3 512 | 2 410 | 5 082 | 5 362 |
| With own children under 6 years | 4 270 | 1 866 | 307 | 976 | 645 | 247 | 1 891 | 4 707 | 895 | 1 587 | 1 097 | 2 373 | 2 626 |
| Total, husband-wife families | 13 718 | 5 853 | 1 212 | 3 628 | 2 069 | 908 | 6 571 | 16 238 | 2 925 | 6 937 | 4 137 | 7 997 | 8 870 |
| With own children under 18 years | 8 104 | 3 361 | 609 | 1 961 | 1 190 | 495 | 3 614 | 8 778 | 1 720 | 3 195 | 2 169 | 4 618 | 4 869 |
| With own children under 6 years | 4 054 | 1 696 | 282 | 897 | 611 | 227 | 1 774 | 4 391 | 845 | 1 486 | 1 015 | 2 218 | 2 467 |
| Total, families with female head | 1 180 | 784 | 165 | 460 | 207 | 87 | 671 | 2 229 | 297 | 599 | 489 | 779 | 902 |
| With own children under 18 years | 617 | 352 | 76 | 198 | 82 | 36 | 316 | 962 | 124 | 265 | 198 | 378 | 402 |
| With own children under 6 years | 196 | 134 | 22 | 64 | 28 | 14 | 99 | 286 | 41 | 88 | 73 | 134 | 129 |
| White, all families | 14 343 | 5 095 | 1 184 | 4 216 | 2 353 | 1 022 | 7 136 | 18 379 | 3 259 | 7 567 | 4 664 | 8 012 | 9 113 |
| With own children under 18 years | 8 296 | 2 846 | 574 | 2 196 | 1 296 | 541 | 3 833 | 9 548 | 1 849 | 3 340 | 2 366 | 4 524 | 4 842 |
| With own children under 6 years | 4 011 | 1 369 | 255 | 975 | 645 | 247 | 1 812 | 4 564 | 884 | 1 507 | 1 077 | 2 135 | 2 349 |
| White, husband-wife families | 13 012 | 4 597 | 1 041 | 3 624 | 2 068 | 904 | 6 373 | 15 868 | 2 894 | 6 697 | 4 074 | 7 272 | 8 175 |
| With own children under 18 years | 7 741 | 2 649 | 526 | 1 959 | 1 190 | 494 | 3 498 | 8 564 | 1 703 | 3 078 | 2 139 | 4 223 | 4 474 |
| With own children under 6 years | 3 862 | 1 313 | 240 | 896 | 611 | 227 | 1 716 | 4 292 | 837 | 1 428 | 1 004 | 2 042 | 2 246 |
| White, families with female head | 968 | 376 | 113 | 460 | 206 | 87 | 607 | 2 050 | 284 | 690 | 464 | 530 | 701 |
| With own children under 18 years | 490 | 165 | 43 | 198 | 82 | 36 | 279 | 857 | 117 | 213 | 186 | 230 | 299 |
| With own children under 6 years | 133 | 45 | 13 | 64 | 28 | 14 | 79 | 243 | 38 | 67 | 65 | 74 | 85 |
| Negro, all families | 929 | 1 688 | 236 | 3 | … | 3 | 273 | 554 | 43 | 359 | 93 | 1 033 | 942 |
| With own children under 18 years | 491 | 950 | 119 | 1 | … | – | 157 | 317 | 23 | 162 | 44 | 555 | 514 |
| With own children under 6 years | 250 | 497 | 52 | – | … | – | 79 | 137 | 10 | 74 | 20 | 236 | 272 |
| Negro, husband-wife families | 689 | 1 253 | 178 | 3 | … | 3 | 196 | 358 | 39 | 331 | 62 | 719 | 688 |
| With own children under 18 years | 353 | 711 | 83 | 1 | … | – | 116 | 206 | 15 | 109 | 30 | 392 | 390 |
| With own children under 6 years | 184 | 383 | 42 | – | … | – | 58 | 95 | 7 | 53 | 11 | 174 | 217 |
| Negro, families with female head | 211 | 358 | 52 | – | … | – | 64 | 170 | 13 | 107 | 25 | 249 | 201 |
| With own children under 18 years | 126 | 187 | 33 | – | … | – | 37 | 100 | 7 | 50 | 12 | 148 | 103 |
| With own children under 6 years | 62 | 89 | 9 | – | … | – | 20 | 47 | 3 | 20 | 8 | 60 | 44 |

# COUNTY AND CITY DATA BOOK 1972

## A Statistical Abstract Supplement

COUNTIES

CITIES, METROPOLITAN AREAS

URBANIZED AREAS, UNINCORPORATED PLACES

REGIONS, DIVISIONS, STATES


Prepared under the direction of

**William Lerner**

Chief, Statistical Compendia Staff

Data User Services Office



**U. S. DEPARTMENT OF COMMERCE**

**Frederick B. Dent, Secretary**

Joseph R. Wright, Jr., Acting Assistant Secretary
for Economic Affairs
and Acting Administrator,

**Social and Economic Statistics Administration**

**BUREAU OF THE CENSUS**

**Robert L. Hagan,** Acting Director






## Table 2.—COUNTIES

[Minus (–) denotes decrease]

| SMSA | SEA | State and county | County | Land area | Population, 1970 | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | U.S. rank[1] | Total | Per square mile[2] | Change, 1960-1970 | | Female | Urban | Race | | | Age | | |
| | | | | | | | | Total[3] | Not migration | | | White | Negro | | Under 5 years | 18 years and over | 65 years and over | Median age |
| | | | | | | | | | | | | | Total | Change, 1960-1970 | | | | |
| | | | | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | 11 | 12 | 13 | 14 | 15 |
| | | | | Sq. mi. | | | | Per cent | Per cent | Per cent | Per cent | | | Per cent | Per cent | Per cent | Per cent | Years |
| | | | TENNESSEE—Con. | | | | | | | | | | | | | | | |
| ... | 04 | 47 137 | Pickett | 158 | [2] 931 | 3 776 | 24 | -14.2 | -21.5 | 50.3 | - | 3 766 | (B) | (B) | 7.1 | 67.5 | 12.5 | 31.9 |
| ... | 08 | 47 139 | Polk | 434 | 2 110 | 11 649 | 27 | -4.0 | -14.7 | 51.2 | - | 11 659 | (B) | (B) | 8.4 | 66.3 | 9.6 | 29.4 |
| ... | 06 | 47 141 | Putnam | 405 | 920 | 35 487 | 88 | 21.4 | 10.9 | 49.8 | 40.2 | 34 955 | 447 | -15.3 | 7.2 | 71.0 | 10.7 | 26.7 |
| ... | 08 | 47 143 | Rhea | 312 | 1 661 | 17 202 | 55 | 8.8 | -1.8 | 51.5 | 25.8 | 16 590 | 583 | -8.8 | 9.4 | 65.1 | 10.4 | 28.0 |
| ... | 08 | 47 145 | Roane | 350 | 842 | 38 881 | 111 | -.6 | -11.3 | 51.8 | 53.5 | 37 337 | 1 510 | -6.2 | 8.0 | 66.5 | 9.1 | 29.5 |
| ... | 04 | 47 147 | Robertson | 476 | 1 100 | 29 102 | 61 | 6.5 | -2.1 | 51.4 | 33.4 | 24 399 | 4 694 | -1.8 | 8.3 | 65.4 | 12.4 | 30.9 |
| ... | 05 | 47 149 | Rutherford | 612 | 570 | 89 428 | 97 | 13.3 | -3.9 | 50.7 | 58.7 | 82 239 | 7 139 | .4 | 8.2 | 67.4 | 8.6 | 25.2 |
| ... | 07 | 47 151 | Scott | 544 | 1 850 | 14 762 | 27 | -11.2 | -18.9 | 50.9 | 18.9 | 14 758 | (B) | (B) | 9.4 | 61.1 | 10.2 | 26.4 |
| ... | 07 | 47 153 | Sequatchie | 273 | 2 673 | 6 331 | 23 | 7.0 | -5.7 | 50.4 | - | 6 331 | (B) | (B) | 9.4 | 65.5 | 9.4 | 26.9 |
| ... | 08 | 47 155 | Sevier | 597 | 1 128 | 28 241 | 47 | 16.5 | 5.0 | 51.1 | 9.4 | 28 143 | (B) | (B) | 8.1 | 66.6 | 10.0 | 29.7 |
| 4920 | 4 | 47 157 | Shelby | 755 | 41 | 722 014 | 956 | 15.2 | .3 | 52.0 | 94.2 | 653 999 | 265 892 | 16.9 | 8.9 | 63.6 | 8.2 | 25.4 |
| ... | 05 | 47 159 | Smith | 323 | 2 034 | 12 509 | 39 | 3.7 | -2.0 | 51.0 | - | 11 878 | 631 | 2.8 | 7.6 | 69.3 | 14.1 | 33.8 |
| ... | 03 | 47 161 | Stewart | 470 | [2] 552 | 7 319 | 16 | -6.8 | -11.2 | 50.2 | - | 7 132 | (B) | (B) | 7.0 | 69.9 | 14.1 | 34.7 |
| ... | 08 | 47 163 | Sullivan | 413 | 279 | 127 329 | 308 | 11.6 | -2.0 | 51.7 | 55.8 | 124 836 | 2 399 | -2.9 | 8.8 | 66.5 | 7.8 | 29.2 |
| 5360 | 04 | 47 165 | Sumner | 534 | 608 | 56 104 | 105 | 53.4 | 42.3 | 50.7 | 50.4 | 51 784 | 4 277 | 3.9 | 9.0 | 63.7 | 8.0 | 28.2 |
| ... | 01 | 47 167 | Tipton | 459 | 1 136 | 28 001 | 61 | -2.0 | -16.3 | 50.8 | 20.7 | 18 908 | 9 084 | -18.8 | 9.4 | 60.0 | 10.2 | 25.2 |
| ... | 05 | 47 169 | Trousdale | 116 | 2 801 | 5 195 | 45 | 4.9 | .9 | 51.3 | - | 4 223 | 932 | 12.6 | 7.8 | 69.3 | 13.6 | 32.1 |
| ... | 08 | 47 171 | Unicoi | 185 | 1 816 | 15 284 | 82 | 1.1 | -7.6 | 51.4 | 47.4 | 15 215 | (B) | (B) | 7.3 | 67.0 | 10.9 | 30.7 |
| ... | 08 | 47 173 | Union | 212 | 2 358 | 9 072 | 43 | 6.8 | -5.3 | 50.4 | - | 9 049 | (B) | (B) | 9.6 | 66.0 | 10.3 | 27.4 |
| ... | 07 | 47 175 | Van Buren | 254 | 2 933 | 3 758 | 15 | 2.4 | -7.1 | 50.2 | - | 3 730 | (B) | (B) | 8.2 | 65.9 | 10.4 | 29.3 |
| ... | 06 | 47 177 | Warren | 439 | 1 171 | 26 972 | 61 | 16.8 | 6.1 | 51.5 | 39.5 | 25 750 | 1 211 | 8.4 | 8.4 | 65.7 | 11.2 | 30.1 |
| ... | 08 | 47 179 | Washington | 323 | 473 | 73 924 | 229 | 14.0 | 3.8 | 50.3 | 45.7 | 71 058 | 2 778 | 11.1 | 8.0 | 68.8 | 10.4 | 29.1 |
| ... | 03 | 47 181 | Wayne | 739 | 2 047 | 12 365 | 17 | 3.8 | -7.3 | 50.9 | - | 12 151 | (B) | (B) | 8.9 | 64.1 | 10.7 | 28.9 |
| ... | 02 | 47 183 | Weakley | 576 | 1 112 | 28 827 | 50 | 19.0 | 17.3 | 50.7 | 28.0 | 27 025 | 1 771 | .9 | 8.6 | 73.6 | 15.1 | 31.1 |
| ... | 06 | 47 185 | White | 382 | 1 736 | 16 385 | 43 | 4.8 | 1.1 | 52.3 | 30.1 | 15 989 | (B) | (B) | 7.7 | 67.7 | 11.4 | 31.6 |
| ... | 05 | 47 187 | Williamson | 593 | 952 | 38 330 | 58 | 36.2 | 25.1 | 50.8 | 27.4 | 29 521 | 4 795 | -5.1 | 8.4 | 66.3 | 9.5 | 28.8 |
| 5360 | 05 | 47 189 | Wilson | 567 | 888 | 34 909 | 65 | 33.7 | 23.9 | 51.3 | 33.8 | 32 848 | 4 132 | .4 | 8.5 | 65.2 | 10.3 | 29.5 |
| | | | TEXAS | | | | | | | | | | | | | | | |
| | | 48 | The State | 262 134 | (X) | 11 195 431 | 43 | 16.9 | 1.5 | 51.1 | 79.8 | 9 749 569 | 1 396 605 | 17.6 | 8.9 | 64.1 | 8.9 | 26.6 |
| ... | 12 | 48 001 | Anderson | 1 072 | 1 145 | 27 789 | 26 | -1.3 | -5.3 | 52.1 | 52.3 | 20 826 | 6 948 | -16.9 | 6.9 | 68.6 | 17.1 | 37.2 |
| ... | 05 | 48 003 | Andrews | 1 504 | 2 224 | 10 372 | 7 | -22.9 | -36.7 | 50.3 | 84.2 | 10 082 | (B) | (B) | 8.7 | 62.3 | 5.6 | 27.3 |
| ... | 13 | 48 005 | Angelina | 738 | 692 | 49 349 | 67 | 23.9 | 10.2 | 51.5 | 53.9 | 40 886 | 8 380 | 18.7 | 9.4 | 64.4 | 10.9 | 28.2 |
| ... | 13 | 48 007 | Aransas | 279 | 2 373 | 8 902 | 32 | 27.1 | 17.4 | 50.4 | 50.5 | 8 540 | (B) | (B) | 7.7 | 63.9 | 13.6 | 33.9 |
| 9080 | K | 48 009 | Archer | 913 | 2 734 | 5 719 | 6 | -5.7 | -14.7 | 50.7 | - | 5 709 | (B) | (B) | 6.9 | 66.5 | 14.5 | 35.3 |
| ... | 04 | 48 011 | Armstrong | 907 | 3 076 | 1 805 | 2 | -3.6 | -2.3 | 47.5 | - | 1 792 | (B) | (B) | 5.3 | 73.1 | 18.8 | 43.6 |
| ... | 11 | 48 013 | Atascosa | 1 206 | 1 558 | 18 786 | 16 | -.7 | -14.7 | 50.9 | 44.8 | 18 656 | (B) | (B) | 9.2 | 60.9 | 11.5 | 26.8 |
| ... | 14 | 48 015 | Austin | 663 | 1 914 | 13 831 | 21 | .4 | -1.7 | 51.9 | 19.9 | 11 182 | 2 683 | -9.1 | 6.5 | 70.4 | 19.7 | 39.6 |
| ... | 05 | 48 017 | Bailey | 835 | [2] 420 | 8 487 | 10 | -8.6 | -23.7 | 51.1 | 53.3 | 8 205 | (B) | (B) | 10.2 | 60.6 | 8.8 | 26.5 |
| ... | 02 | 48 019 | Bandera | 763 | 2 844 | 4 767 | 6 | 22.0 | 23.2 | 51.0 | - | 4 720 | (B) | (B) | 5.7 | 71.6 | 18.1 | 42.1 |
| ... | 09 | 48 021 | Bastrop | 890 | 1 654 | 17 297 | 19 | 2.2 | -1.3 | 51.7 | 57.7 | 12 730 | 4 534 | -14.3 | 7.2 | 66.8 | 17.3 | 36.1 |
| ... | 06 | 48 023 | Baylor | 845 | [2] 795 | 5 221 | 6 | -11.4 | -15.0 | 51.8 | 69.0 | 5 054 | (B) | (B) | 6.5 | 72.0 | 20.2 | 43.0 |
| ... | 11 | 48 025 | Bee | 842 | [1] 354 | 22 737 | 27 | -4.3 | -28.6 | 48.9 | 58.7 | 22 044 | 563 | 5.0 | 9.1 | 63.0 | 8.1 | 23.4 |
| ... | 08 | 48 027 | Bell | 1 047 | 288 | 126 483 | 119 | 32.3 | 7.3 | 45.1 | 84.8 | 107 327 | 15 772 | 88.1 | 8.9 | 68.8 | 7.0 | 23.1 |
| 7240 | F | 48 029 | Bexar | 1 246 | 34 | 830 460 | 667 | 20.9 | 1.8 | 50.8 | 94.9 | 748 201 | 56 138 | 23.9 | 9.4 | 62.0 | 7.5 | 28.0 |
| ... | 02 | 48 031 | Blanco | 719 | 2 955 | 3 567 | 5 | -2.5 | -2.1 | 52.1 | - | 3 519 | (B) | (B) | 5.8 | 71.1 | 19.8 | 42.0 |
| ... | 06 | 48 033 | Borden | 907 | 3 122 | 782 | 1 | -17.5 | -23.2 | 44.1 | - | 782 | (B) | (B) | 7.9 | 64.8 | 7.2 | 38.1 |
| ... | 07 | 48 035 | Bosque | 990 | 2 173 | 11 072 | 11 | 1.5 | 5.8 | 51.8 | 26.7 | 10 717 | (B) | (B) | 6.8 | 70.5 | 23.9 | 47.6 |
| 8360 | 12 | 48 037 | Bowie | 891 | 508 | 67 813 | 76 | 13.1 | 1.8 | 52.0 | 63.8 | 52 955 | 14 730 | 2.5 | 8.5 | 66.0 | 11.6 | 30.5 |
| 5360 | 14 | 48 039 | Brazoria | 1 423 | 323 | 108 312 | 76 | 42.1 | 25.1 | 47.9 | 61.3 | 97 899 | 10 118 | 11.5 | 9.1 | 62.2 | 5.4 | 26.1 |
| 1260 | 09 | 48 041 | Brazos | 586 | 583 | 57 978 | 99 | 29.1 | 10.4 | 45.3 | 88.8 | 48 189 | 9 343 | (Z) | 9.2 | 68.6 | 7.5 | 22.8 |
| ... | 01 | 48 043 | Brewster | 6 204 | 2 498 | 7 780 | 1 | 20.9 | 5.1 | 49.6 | 78.8 | 7 692 | (B) | (B) | 8.1 | 68.8 | 8.5 | 32.1 |
| ... | 04 | 48 045 | Briscoe | 874 | 3 005 | 2 704 | 3 | -21.9 | -33.0 | 51.0 | - | 2 721 | (B) | (B) | 7.2 | 65.9 | 12.4 | 32.1 |
| ... | 03 | 48 047 | Brooks | 904 | [2] 478 | 8 005 | 9 | -7.0 | -27.0 | 50.9 | 83.8 | 7 995 | (B) | (B) | 9.7 | 56.8 | 7.8 | 24.5 |
| ... | 06 | 48 049 | Brown | 938 | 1 218 | 25 877 | 28 | 6.6 | 1.6 | 52.9 | 67.1 | 24 859 | 885 | 19.1 | 6.3 | 72.3 | 18.6 | 36.8 |
| ... | 09 | 48 051 | Burleson | 670 | [2] 263 | 9 999 | 15 | -10.5 | -16.1 | 51.9 | - | 7 163 | 2 817 | -19.4 | 6.5 | 67.7 | 18.4 | 37.6 |
| ... | 07 | 48 053 | Burnet | 994 | 2 132 | 11 420 | 11 | 23.3 | 20.2 | 50.9 | 27.0 | 11 191 | (B) | (B) | 5.8 | 72.5 | 21.1 | 43.1 |
| ... | 10 | 48 055 | Caldwell | 548 | 1 414 | 21 178 | 39 | 23.0 | 15.5 | 48.1 | 52.9 | 16 593 | 4 501 | 74.3 | 7.2 | 62.0 | 13.5 | 23.0 |
| ... | 14 | 48 057 | Calhoun | 527 | 1 615 | 17 831 | 34 | 7.5 | -14.8 | 50.3 | 58.5 | 17 030 | 785 | -4.0 | 9.0 | 57.6 | 5.6 | 23.5 |
| ... | 06 | 48 059 | Callahan | 856 | 2 450 | 8 205 | 10 | 3.5 | 3.4 | 51.6 | - | 8 199 | (B) | (B) | 5.4 | 71.2 | 20.9 | 41.2 |
| 1240 | 15 | 48 061 | Cameron | 896 | 260 | 140 368 | 157 | -7.1 | -32.1 | 52.7 | 77.6 | 139 490 | 599 | -35.0 | 10.8 | 56.4 | 8.5 | 21.8 |
| ... | 12 | 48 063 | Camp | 192 | [2] 478 | 8 005 | 42 | 2.0 | -6.0 | 52.1 | 48.0 | 5 183 | 2 817 | -5.6 | 7.9 | 65.7 | 16.0 | 35.1 |
| ... | 04 | 48 065 | Carson | 900 | 2 669 | 6 358 | 7 | -18.3 | -28.9 | 51.1 | - | 6 305 | (B) | (B) | 7.0 | 64.3 | 11.7 | 31.9 |
| ... | 12 | 48 067 | Cass | 961 | 1 291 | 24 133 | 26 | 2.7 | -3.8 | 52.3 | 20.7 | 17 695 | 6 395 | -8.3 | 7.3 | 66.8 | 14.6 | 32.6 |
| ... | 04 | 48 069 | Castro | 880 | 2 221 | 10 394 | 12 | 16.5 | -8.9 | 49.5 | 39.4 | 9 867 | 511 | 37.4 | 11.6 | 54.0 | 5.2 | 20.3 |
| ... | 14 | 48 071 | Chambers | 616 | 2 061 | 12 187 | 20 | 17.4 | 6.1 | 50.1 | - | 9 625 | 2 487 | 8.7 | 8.7 | 62.9 | 7.6 | 27.6 |
| ... | 12 | 48 073 | Cherokee | 1 049 | 1 023 | 32 008 | 31 | -3.4 | -8.2 | 51.8 | 46.4 | 24 853 | 7 129 | -16.3 | 6.8 | 71.2 | 16.4 | 37.7 |
| ... | 04 | 48 075 | Childress | 699 | [2] 636 | 6 605 | 9 | -21.6 | -23.7 | 53.1 | 84.7 | 6 254 | (B) | (B) | 5.6 | 73.9 | 20.5 | 42.6 |
| ... | 04 | 48 077 | Clay | 1 102 | 2 466 | 8 079 | 7 | -3.3 | -3.5 | 51.6 | 37.2 | 8 048 | (B) | (B) | 5.7 | 69.7 | 17.1 | 37.1 |
| ... | 05 | 48 079 | Cochran | 783 | 2 784 | 5 326 | 7 | -17.0 | -37.3 | 51.0 | 48.1 | 4 886 | 418 | 43.2 | 9.2 | 56.9 | 8.4 | 25.1 |
| ... | 02 | 48 081 | Coke | 911 | 2 982 | 3 087 | 3 | -18.0 | -15.9 | 51.8 | - | 3 087 | (B) | (B) | 6.4 | 71.2 | 16.1 | 38.4 |
| ... | 06 | 48 083 | Coleman | 1 280 | 2 231 | 10 268 | 8 | -17.4 | -16.0 | 53.5 | 54.8 | 10 026 | (B) | (B) | 5.6 | 73.0 | 23.9 | 45.4 |
| 1920 | C | 48 085 | Collin | 836 | 514 | 66 920 | 80 | 62.2 | 48.5 | 51.2 | 58.4 | 62 053 | 4 555 | 3.4 | 10.4 | 63.5 | 9.7 | 26.9 |
| ... | 06 | 48 087 | Collingsworth | 898 | 2 842 | 4 755 | 5 | -26.2 | -31.7 | 52.2 | 62.3 | 4 308 | 426 | -20.2 | 6.6 | 70.7 | 20.2 | 41.3 |
| ... | 14 | 48 089 | Colorado | 949 | 1 626 | 17 638 | 19 | -4.5 | -10.7 | 51.3 | 39.5 | 13 567 | 4 066 | -11.5 | 7.4 | 66.0 | 14.8 | 34.0 |
| ... | 02 | 48 091 | Comal | 567 | 1 289 | 24 165 | 43 | 21.8 | 10.2 | 51.7 | 73.9 | 23 758 | (B) | (B) | 8.0 | 66.5 | 12.5 | 31.4 |
| ... | 07 | 48 093 | Comanche | 944 | 2 082 | 11 898 | 13 | .3 | 2.4 | 51.9 | 33.1 | 11 885 | (B) | (B) | 5.8 | 73.2 | 21.6 | 43.3 |
| ... | 02 | 48 095 | Concho | 1 008 | 2 991 | 2 937 | 3 | -20.0 | -28.4 | 52.2 | - | 2 937 | (B) | (B) | 7.4 | 70.9 | 21.0 | 43.2 |

- Represents zero. B Data not shown where population is less than 400. X Not applicable.
[1] Based on corrected population totals shown in Appendix B. [2] Nantucket County, Mass. and Pickett County, Tenn. are identical in rank—2931.
[3] Stewart County, Tenn. and Pepin County, Wis. are identical in rank—3559. [4] Keith County, Nebr. and Bailey County, Tex. are identical in rank—2420.
[5] Bremer County, Iowa and Bee County, Tex. are identical in rank—1354. [6] Brooks County, Tex. and Camp County, Tex. are identical in rank—2478.
[7] Grant County, Ky. and Burleson County, Tex. are identical in rank—2283. [8] Cleveland County, Ark. and Childress County, Tex. are identical in rank—2636.

# JUDICIAL NEWSLETTER
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The Public Law Institute is pleased to announce the recent appointment of Ms. Patricia J. Cottrell as Director of the Public Law Institute. She has previously worked with the Public Research and Service Program as Project Administrator of the Legal Assistant Training Program. Since graduation from the University of Tennessee College of Law in June, 1976, she has been employed as an Assistant Attorney General in Nashville in the areas of criminal, juvenile, and civil litigation.

Former Public Law Research and Service Program Coordinator Grayfred B. Gray is pursuing further studies at the University of Michigan Law School. The editors of the Judicial Newsletter wish to express their sincere appreciation for the counseling and assistance Professor Gray has given towards the development of the Newsletter. When he returns to the College of Law in June, 1978, Mr. Gray will serve as Faculty Coordinator for the Public Law Institute. Professor Neil Cohen is serving in the capacity of Faculty Coordinator in the interim.

# MITCHELL V. ROSE: CONSTITUTIONAL GUARANTEEES EXTENDED TO GRAND JURY FOREMAN SELECTION

Diana D. Shuck, Law Student
University of Tennessee
College of Law

Racial discrimination in the selection of grand jury venires has been recognized as unconstitutional for over a century. The Fourteenth Amendment guarantees to persons of color "the right to exemption from unfriendly legislation against them distinctly as colored." [Strauder v. West Virginia, 110 U.S. 303, 308 (1879).] Recently, the Sixth Circuit United States Court of Appeals extended this constitutional guarantee to the selection of grand jury foreman venires. [Mitchell v. Rose, 570 F.2d 129 (1978).] Mitchell said that convictions cannot stand where a prima facie case of discrimination in the selection of the grand jury foreman has been established and not rebutted. This decision affects the Tennessee judiciary for two reasons: first, the Mitchell case originated in Tipton County, Tennessee and second, T.C.A. §40-1506 allows the local judge to hand-pick the grand jury foreman.

## HISTORICAL BACKGROUND

> "No citizen possessing all other qualifications which are or may be proscribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude..." [18 U.S.C. §243 (1875).]

18 U.S.C. §243 was enacted in 1875 to ensure that no citizen would be excluded from jury duty on account of race, color, or previous condition of servitude by making such exclusion a crime. Four years later, the United States Supreme Court declared unconstitutional a discriminatory state statute which prohibited blacks from serving on grand juries. [Strauder v. West Virginia, 110 U.S. 303 (1879).] States had no constitutional duty to provide grand juries but they had to meet constitutional criteria if grand juries were used in the indictment process. [Ex parte Virginia, 100 U.S. 339, 346-347 (1879).] Total exclusion of blacks from jury service is obviously unconstitutional. After Strauder, some states passed race-neutral statutes while continuing to prevent persons of color from serving on grand juries. In response to such tactics, the constitutional prohibition was extended in 1881 to discriminatory enforcement of neutral statutes. [Neal v. Delaware, 103 U.S. 370 (1881).]

The development of a "prima facie case" of discrimination was discussed in the "neutral statute" case of Norris v. Alabama. [294 U.S. 587 (1935).] Two facts enabled Norris to prove his case: no black had ever served on a jury in his community and the jury commissioners admitted they had never considered permitting a black to serve. It was also proven that some blacks were otherwise qualified to be on a jury. This selection procedure alone was enough to assert a prima facie case of discrimination which the State did not rebut.

The Supreme Court has also recognized substantial underrepresentation and proportional limitations on the number of blacks on





jury lists as raising serious due process and equal protection questions. Courts have stated a belief that chance and accident alone could not bring about a substantial disparity between the number of blacks sitting on juries and the number qualified to serve. Where it was statistically proven that a mere five persons of color had served on the past thirty-two grand juries, a Harris County, Texas court found the partial exclusion to be purposeful and in violation of the Fourteenth Amendment. [Smith v. Texas, 311 U.S. 128 (1940).]

Limitations have rarely been imposed upon who may challenge the composition of a grand jury. It is usually unnecessary to determine if the litigant was in any way prejudiced or whether he was one of the excluded class. [Thiel v. Southern Pacific Co., 328 U.S. 217 (1946).] In Tennessee, however, the plaintiff must show prejudice but not class membership. [Young v. State, 458 S.W.2d 635 (Tenn. Crim. App. 1970).] A caucasion has successfully attacked a jury venire which contained no blacks [Peters v. Kiff, 407 U.S. 493 (1972)] and a man has standing to raise the issue of jury discrimination when there were no women selected for grand jury duty. [Taylor v. Louisiana, 419 U.S. 522 (1975).] Affirmative relief may be sought by plaintiffs excluded from jury service as well as criminal defendants who seek to challenge the judgments against them. [Carter v. Jury Commission of Greene County, 396 U.S. 320 (1970).] In the light of the potential great harm to defendants and their constitutional interests, most courts would rather err in allowing too many defendants to challenge than too few.

An official act is not unconstitutional solely because it has a racially disproportionate impact. [Washington v. Davis, 426 U.S. 229 (1966).] Actual discrimination against members of a particular group in the selection of a grand jury is on the party who asserts the discrimination. There is a presumption that officers in charge of the selection of a jury panel have performed their duty fairly, but this presumption can be overcome by evidence to the contrary. [Montgomery v. State, 45 So. 879 (Fla. 1908).] When a prima facie case of discrimination in selecting a jury panel is presented, the burden then falls on the State to overcome it. [Patton v. Mississippi, 332 U.S. 463 (1947).] The burden is not met by mere assertions by public officials that there has been no discrimination. The Norris case said:

> "if... the mere general assertions by officials of their performance of duty were to be accepted as an adequate justification for the complete exclusion of Negroes from jury service, the Constitutional provision--adopted with special reference to their protection--would be but a vain and illusory requirement." [294 U.S. at 593 (1935).]

It is assumed if the state has any contradictory evidence to disprove the prima facie case, it will not refrain from introducing it. [Pierre v. Louisiana, 306 U.S. 354 (1938).]

The Constitution does not require that every grand jury represent every class, subclass or identifiable group in the community. The only requirement is that a fair jury be selected without regard to race. A defendant has no Fourteenth Amendment right to be indicted or tried by any particular jury, or by a jury composed in part of

members of his race. [Virginia v. Rives, 100 U.S. 313 (1880).] Fairness in the selection of a jury does not require a proportional representation by race. [Akins v. Texas, 325 U.S. 398 (1945).]

The issue of racial discrimination in the selection of grand jury foremen was first addressed in Hale v. Henderson, 485 F.2d 266 (6th Cir. 1973). In Hale, the petitioner alleged racial discrimination in the selection of the grand jury foreman, but not in the selection of the grand jury. The case originated in Tennessee where T.C.A. §40-1506 allows the local judge to hand-pick the foreman. A black had never served in that county and it appeared that Hale could prove a prima facie case. He did not succeed with his appeal, however, since the regular foreman was not serving and in his place a foreman pro tempore had been chosen from the regular grand jury venire. Hale had not alleged discrimination in the selection of the regular grand jury and his case was lost.

MITCHELL V. ROSE: THE 14TH AMENDMENT APPLIED TO GRAND JURY FOREMAN SELECTION

As the first federal case to apply jury discrimination standards to foremen and forewomen, Mitchell v. Rose, 570 F.2d 129 (1978), relies on the proposition that a grand jury which is only twelve-thirteenths constitutional cannot render constitutionally valid indictments. This is true even if the foreman or forewoman does not actually vote on the indictment. Each panel of grand jurors is a distinct legal entity and the identity of the foreman is merged with the other jurors. Therefore, previous statutory and case law concerning racial discrimination in grand juries is also applicable to foreman selection.

In Mitchell, a Tipton County, Tennessee case, the foreman was personally selected by the trial judge with no consultation to the venire lists. The petitioners attacked the selection of the foreman and the grand jury, claiming there had never been a black foreman in the history of Tipton County and that there was substantial disparity between the number of blacks qualified to serve and the number listed on the venire lists. The Sixth Circuit Court of Appeals expressed doubt as to the validity of the grand jury allegation but did not have to decide the issue because they declared a prima facie case had been made on the foreman issue.

Mitchell adopts the "combination of factors" test enunciated in previous grand jury discrimination cases and uses it to prove a prima facie case on the foreman issue. The test is as follows: if over a significant period of time there exists substantial disparity between the proportion of blacks in the general population and the proportion called to serve and if selection procedure is not racially neutral or affords opportunity to discriminate, then the defendant has made out a prima facie case. [Castaneda v. Partida, 430 U.S. 487 (1977); Alexander v. Louisiana, 405 U.S. 625 (1972); Avery v. Georgia, 345 U.S. 559 (1953).] Two factors established the prima facie case: first, no black person had ever been selected to serve as foreman or forewoman in a county that was 32% black; and second, the trial judge admitted that he "never really gave any thought" to appointing a black grand jury foreman.





The petitioners in Mitchell were not required to show prejudice in the selection of the foreman. The Sixth Circuit believed that the foreman in Tennessee had a position of authority and influence and that the potential for prejudice was clear. [See T.C.A. §40-1510).] Although the prejudice of a grand jury foreman could be far-reaching, it might be impossible to prove, and the petitioners would be unable to obtain any relief from the courts. Therefore, proof of prejudice was not required.

The petitioners prevailed in Mitchell because the trial judge had not complied with his duty as a foreman selector. State officials who choose grand jurors have the duty to learn who is qualified for service without regard to race and must consider individuals from all segments of society. [Turner v. Fouche, 396 U.S. 346 (1970).] Discrimination occurs when officials exclude all blacks whom they do not know to be qualified and no attempt is made to discover who is qualified. [Hill v. Texas, 316 U.S. 400 (1942).] Mitchell goes one step further and says that systematic discrimination is enough to establish that officials have failed in their duty.

The Sixth Circuit does not imply that there must be black grand jury foremen or even that a proportional number of blacks must serve. The only requirement is that the selection system entail consideration of blacks and other subgroups for the position. In areas where jurors and foremen are randomly selected with no regard to race or color, there should already be compliance. The larger problem exists where key-man systems, such as exists in Tennessee, or similar methods of hand-picking jurors are still in effect. Only when a special effort has been made by officials to consult with members of identifiable groups to insure cross-sectional representation has a key-man system been declared nondiscriminatory. [Swain v. Alabama, 380 U.S. 202 (1965).]

The remedy in Mitchell for a successful challenge of discrimination in selection of a foreman or forewoman is reversal. Previous grand jury cases have afforded the same remedy, no matter how strong the evidence of guilt. [Avery v. Georgia, 345 U.S. 559 (1953).] The petitioners in Mitchell had been indicted and convicted on two counts of first degree murder before the Sixth Circuit reversed. The court, however, did not intend for those truly guilty to go free. Mitchell said the lower court may reindict and reconvict by procedures conforming to constitutional requirements.

IMPLIED DUTIES OF THE TENNESSEE JUDICIARY AFTER MITCHELL

As long as Tennessee continues the key-man method of jury selection, state officials and state judges will have to take visible, affirmative steps to seek out qualified blacks to serve as foremen in their prospective counties. It is not mandatory that a black serve in that position nor will the presence of one or two blacks prove nondiscrimination. It is the act of genuinely searching for qualified people of all races and subgroups in an effort to achieve a representative cross-section of the community that shows nondiscrimination in the selection of a grand jury foreman. If there are a substantial number of qualified blacks, naturally such a search will result in black foremen.

In a key-man state where the foremen position is filled by the trial judge from the general population, there is ample opportunity for discrimination, whether conscious or unconscious. While discrimination must be intended, officials who select grand jurors must be considered to have intended the natural results which flow from their conduct. [Rabinowitz v. United States, 366 F.2d 34 (5th Cir. 1966).] The trial judge in Mitchell who "never really gave any thought" to appointing a black was intentionally discriminating. Judges must take seriously their duty to consider qualified individuals from all segments of society to serve as foreman or forewoman. Mere assertions by judges that there has been no discrimination in the selection procedure will not rebut a prima facie case to the contrary. [Norris v. Alabama, 294 U.S. 587 (1935).]

Counties that have an identifiable group of blacks as residents will be expected to at least seriously consider choosing a black to serve as grand jury foreman. According to the laws of statistics, the larger the black population, the greater the probability that many blacks are qualified to serve and should therefore be considered. The United States Supreme Court has never used any magical per capita formula to decide what is discriminatory and what is not in the selection of grand jurors. Instead, they have left the rules flexible. The Mitchell case suggests guidelines for the protection of Fourteenth Amendment rights which could be applicable at least in the courts of Tennessee.

[EDITOR'S NOTE: The United States Supreme Court is presently considering review of the Mitchell case, but certiorari has yet to be granted.]

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APPENDIX 17

FOR ARGUMENT

Supreme Court, U. S.
FILED
DEC 29 1978
MICHAEL RODAK, JR., CLERK

No. 77-1701

# In the Supreme Court of the United States

OCTOBER TERM, 1978

---

JIM ROSE, WARDEN, PETITIONER

*v.*

JAMES E. MITCHELL and JAMES NICHOLS, JR.

---

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

---

## MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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# In the Supreme Court of the United States

OCTOBER TERM, 1978

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No. 77-1701

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JIM ROSE, WARDEN, PETITIONER

*v.*

JAMES E. MITCHELL and JAMES NICHOLS, JR.

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

---

## MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

---

### QUESTION PRESENTED

Whether federal habeas corpus should be available to remedy a denial of equal protection in the selection of a grand jury foreman where the issue has been litigated in the state courts and the state has failed to rebut the prisoners' prima facie showing of racial discrimination.

## INTEREST OF THE UNITED STATES

Title IX of the Civil Rights Act of 1964, 42 U.S.C. 2000h-2, provides, *inter alia*, that the Attorney General may intervene in any action in federal court that alleges a denial of equal protection of the laws on account of race or color, and that the Attorney General certifies is of general public importance. The United States has intervened in actions alleging discrimination in jury selection,[1] and has also participated as amicus curiae in this Court in litigation challenging state jury selection practices.[2] In addition, the United States may prosecute persons who exclude citizens from service on state grand juries or petit juries on account of race or color. 18 U.S.C. 243.

This Court's decision last term in *Castaneda* v. *Partida*, 430 U.S. 482 (1977), is the most recent of many cases in which state prisoners have utilized federal habeas corpus to vindicate their right to equal protection in the selection of grand and petit jurors.[3]

---

[1] See, *e.g.*, *Turner* v. *Spencer*, 261 F. Supp. 542 (S.D. Ala. 1966).

[2] See Memorandum for the United States as Amicus Curiae, *Duren* v. *Missouri*, No. 77-6067, October Term, 1978, filed July 21, 1978.

[3] See, *e.g.*, *Peters* v. *Kiff*, 407 U.S. 493 (1972); *Hairston* v. *Cox*, 500 F.2d 584 (4th Cir. 1974) (*en banc*); *Smith* v. *Yeager*, 465 F.2d 272 (3d Cir.), cert. denied, 409 U.S. 1076 (1972); *Witcher* v. *Peyton*, 405 F.2d 725 (4th Cir. 1969); *Labat* v. *Bennett*, 365 F.2d 698 (5th Cir. 1966), cert. denied, 386 U.S. 991 (1967); *Ford* v. *Hollowell*, 385 F. Supp. 1392 (N.D. Miss. 1974); *Fuller* v. *Cox*, 356 F. Supp. 1185 (W.D. Va. 1973); *Woods* v. *Beto*, 348 F. Supp. 573 (N.D. Tex. 1972).



While the appropriateness of federal collateral relief to remedy this particular type of constitutional error was not at issue in *Castaneda*, that question is presented in the instant case; petitioner relies on *Stone* v. *Powell*, 428 U.S. 465 (1976), to argue that federal habeas relief should not be available where the state prisoners have not challenged the composition of the petit jury, there is substantial evidence of guilt, and the grand jury issue has been fully and fairly litigated in the state courts. The interest of the United States in this case is premised on the need to maintain the integrity of the jury system and prevent the exclusion of persons from jury service on racial grounds, and on the importance of the availability of federal habeas corpus as a means of accomplishing that goal.

## STATEMENT

1. On November 6, 1972, respondents James Mitchell and James Nichols, Jr., were indicted on two counts of murder in the first degree in Tipton County, Tennessee. Prior to trial respondents sought, by pleas in abatement, to dismiss the indictment on the grounds that the grand jury and the grand jury foreman had been selected in a racially discriminatory fashion (App. 1-2). The pleas were denied by the trial court after hearing testimony from the three Tipton County jury commissioners, three former grand jury foremen—including the foreman of the grand jury that had indicted respondents—eleven of the twelve other members of that grand jury, and

the circuit court clerk (App. 3-36). Respondents were tried, convicted, and sentenced to sixty years' imprisonment. The Tennessee Court of Criminal Appeals affirmed the convictions (App. 37-42), and the Supreme Court of Tennessee denied certiorari (App. 42).

The respondents then filed separate petitions for federal habeas corpus in the district court (App. 43-52, 62-73). These petitions were consolidated; the district court declined to conduct an evidentiary hearing, and found that there had been no impropriety in the selection of the grand jury. However, in the selection of the grand jury foreman, the district court held that respondents had made out a prima facie case of racial discrimination, and ordered the state to make further response (App. 98-99). The state submitted two affidavits: one from the foreman himself, indicating that he had not voted on respondents' indictments, and one from the judge who appointed the foreman, disavowing any racial motive in the appointment (App. 105-106, 112-113). On the basis of these affidavits the district court dismissed the petitions (App. 121-122, 124-126).[4] Re-

[4] The district court entered its order dismissing the petitions on February 18, 1977 (App. 123-124). On March 23, 1977, the district court denied respondents' motion for a hearing and for reconsideration. At that time it stated it found further support for its dismissal of the petitions in *Stone* v. *Powell*, and concluded that "since the contention [as to discrimination in the selection of the grand jury foreman] was fairly heard in state court, petitioners are not entitled to another review here" (App. 125-126).



spondents appealed and the court of appeals reversed as to the selection of the foreman (App. 127-141; 570 F.2d 129).

2. Under Tennessee's "key man" system of grand jury selection, the jurors are chosen by three jury commissioners who are, in turn, appointed by a judge. However, the foreman of the grand jury is selected directly by the judge from the eligible population for a two-year appointment. Tenn. Code Ann. § 40-1506 (1975). The foremen are subject to the same statutory qualifications as the grand jurors, except that they must be at least twenty-five years old. Tenn. Code Ann. § 40-1507 (1975). Included among the duties of the foreman are assisting and advising the district attorney in investigating crime, supplying the names of witnesses, issuing subpoenas, administering oaths to witnesses, and indorsing and signing indictments. Tenn. Code Ann. §§ 40-1510, 40-1706 (1975). The foreman serves as the thirteenth member of the grand jury "having equal power and authority in all matters coming before the grand jury with the other members thereof." Tenn. Code Ann. § 40-1506 (1975).

In the instant case the foreman of respondents' grand jury had been asked by the circuit judge to substitute for the regular foreman who was unavailable. The substitute, Peyton Smith, had served previously as a foreman, and according to the circuit judge's affidavit was chosen because of his experience and ability. App. 112-113. Testifying at the hear-

ing on the pleas in abatement, Smith related (App. 23) that he

> usually questions the witnesses first to get basic information to the attention of the members of the Grand Jury and then I ask, after each witness has been examined, if there's anyone in the room that wants to ask any further questions of that witness.

In respondents' case only one witness, the deputy sheriff who had investigated the murders (App. 118), was questioned (App. 24). The grand jury members were then polled to see if they wanted to hear any more testimony before voting, and they did not (*ibid.*). Since the other grand jury members voted unanimously to return the indictment, Smith did not vote (App. 105).[5]

None of the grand jury foremen who testified at the hearing on respondents' pleas in abatement could recall that there had ever been a black grand jury foreman in Tipton County. App. 17-25.[6] In the affidavit of the circuit judge submitted by petitioner in the federal habeas proceedings, the judge stated that there was no black foreman in the five counties in which he appointed foremen, and added that he

[5] In his affidavit, Smith stated that during all his service as grand jury foreman he had voted on only one indictment; in all other cases, true bills were returned based solely on the unanimous vote of the other 12 members (App. 105).

[6] Their experience covered the period from "the early '50's" (App. 20) to the date of the hearing in 1973 (App. 17, 24-25).



had not "really given any thought to appointing a black foreman but I have no feeling against doing so." He also stated that he does not appoint new foremen very often because he usually reappoints them when their two-year term expires and "thus they serve a long time." App. 113.[7]

3. The court of appeals concurred in the district court's conclusion that respondents had proved a prima facie case of racial discrimination in the selection of the grand jury foreman, but disagreed with the court's determination that the state's evidence was sufficient to rebut that case (App. 137). First, the court of appeals pointed out that the circuit judge's affidavit asserting that he acted in good faith and without racial motivation in choosing the foreman is not adequate to rebut a prima facie show-

[7] Respondents' motions to quash their indictments were heard by the same judge whose foreman appointment practices they challenged—Herman L. Reviere, circuit judge for the Sixteenth Judicial Circuit of Tennessee. That circuit also includes Fayette, Hardeman, Lauderdale, and McNairy Counties. At the hearing on respondents' motions, Judge Reviere pointed out that he had been on the bench since 1966 (App. 5). Thus, in the at least fifteen opportunities he had from 1966 until respondents' trial in 1973 to appoint grand jury foremen in the five counties, he had evidently never appointed a black. Census figures for 1970 show the following percentages of black persons twenty-five years of age or over in the five counties: Fayette County—52%; Hardeman County—30%; Lauderdale County—28%; McNairy County—5%; Tipton County—28%. Bureau of the Census, *1970 Census of Population, Characteristics of the Population, Part 44: Tennessee*, Table 35, pp. 109, 112, 116, 117, 124.

ing of systematic exclusion in the selection of grand jurors (App. 137). Second, the court of appeals rejected the district court's conclusion that respondents had not suffered a deprivation of equal protection because the foreman had not voted on their indictments. The court pointed out that the foreman plays a vital role in the functioning of a Tennessee grand jury (App. 138-139; citations omitted):

> He or she is expected to assist the district attorney in investigating crime, may administer oaths to all witnesses, conduct the questioning of witnesses, must indorse and sign all indictments, and like every other chairperson is in a position to guide, whether properly or improperly, the decision making process of the body. Additionally, the indorsement and signature of the foreman or forewoman is indispensible to an indictment in Tennessee, and their absence voids the bill.

Moreover, by statute the foreman is a full member of the grand jury, and the court of appeals observed that a grand jury "which is only twelve-thirteenths constitutional cannot render constitutionally valid indictments" (App. 139).

Finally, the court of appeals, while recognizing the possibility of "insidious and far-reaching" prejudice to respondents, rejected the contention that they were required to demonstrate actual prejudice in order to prevail. App. 140-141. The court pointed out that no such showing of actual harm had ever been required in the context of an equal protection



challenge to the composition of a jury, and went on to state that such a requirement would be inappropriate since the injury sought to be redressed is not merely an injury to the defendants themselves, but to "the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts" (App. 140 (quoting from *Ballard* v. *United States*, 329 U.S. 187, 195 (1946)).

The court remanded the case with directions to release them on the writ unless they were properly reindicted within sixty days (App. 141).

## SUMMARY OF ARGUMENT

Federal habeas corpus has long been available to redress denials of equal protection through racial discrimination in state grand jury selection procedures, to safeguard the significant individual and societal values underlying the Fourteenth Amendment. It would be inappropriate for this Court to extend its holding in *Stone* v. *Powell* to preclude consideration by federal courts of Fourteenth Amendment claims of the type presented here because, unlike the exclusionary rule at issue in *Stone*, the remedy sought by the respondents is the primary instrument for correcting the harm done to themselves, to the community, and to the integrity of the jury system by the state's denial of equal protection. In weighing the constitutional interest here against the cost to society of allowing grand jury challenges to be aired by state prisoners on federal collateral

attack, the balance should be struck in favor of permitting such challenges.

Nor should this Court depart from the principle—firmly rooted in close to a century of case law—that a criminal defendant is not required to demonstrate actual prejudice or direct impact on guilt or innocence in order to prevail on a jury discrimination claim. The court of appeals correctly rejected the state's "harmless error" argument on the grounds that application of that doctrine leaves unvindicated the interest of the community at large in maintaining the integrity of the jury system.

## ARGUMENT

### I.

### FEDERAL HABEAS CORPUS RELIEF IS APPROPRIATE WHERE A STATE PRISONER HAS MADE OUT AN UNREBUTTED PRIMA FACIE CASE OF RACIAL DISCRIMINATION IN GRAND JURY SELECTION PROCEDURES AND THE STATE COURTS HAVE NOT REMEDIED THE FOURTEENTH AMENDMENT VIOLATION

#### A. Habeas Corpus Has Traditionally Been Available To Remedy Denials Of Equal Protection In The Selection Of State Grand And Petit Juries

Where, as here, state prisoners have presented prima facie evidence of the denial of equal protection in jury selection procedures and the state has not rebutted that evidence,[8] federal habeas corpus relief

[8] The district court and the court of appeals were correct in their finding that respondents had made out a prima facie



has long been afforded in cases in which the state courts have failed to redress the wrong.[9]

In *Brown* v. *Allen*, 344 U.S. 443, 470 (1953), this Court reiterated:

> [d]iscriminations against a race by barring or limiting citizens of that race from participation in jury service are odious to our thought and our Constitution.

For that reason, jury discrimination claims[10] have been considered on federal collateral attack whether they are based on total exclusion or substantial un-

case of racial discrimination in the selection of grand jury foremen in Tipton County. The foremen who testified could not recall a black person ever serving in that position (App. 17-25), and the trial judge who made the appointments candidly admitted that he had not "really given any thought to appointing a black foreman." App. 113. The state does not contest the prima facie showing, but argues instead that the evidence of discrimination was rebutted by the judge's affidavit stating non-racial reasons for the appointment of the particular foreman in respondents' case (Pet. Br. 26-27). That evidence was properly rejected by the court of appeals as insufficient (App. 137). See *Alexander* v. *Louisiana*, 405 U.S. 625 (1972); *Turner* v. *Fouche*, 396 U.S. 346, 361 (1970) and cases there cited.

[9] See cases cited at note 3, *supra*.

[10] Since *Strauder* v. *West Virginia*, 100 U.S. 303 (1879), claims of discriminatory selection of grand and petit jurors have been treated as requiring the same analysis and, if demonstrated, justifying the same relief. Accordingly, petitioner's suggestion (Pet. Br. 18) that any defect in the constitution of the grand jury is mooted by the subsequent trial and conviction is contrary to this Court's consistent treatment of grand jury discrimination claims. See *infra*, point II. See also *Pierre* v. *Louisiana*, 306 U.S. 354, 356-358 (1939).

derrepresentation (see *Castaneda* v. *Partida, supra*), and regardless of the race of the state prisoner claiming the denial of equal protection (see *Peters* v. *Kiff, supra*).[11] Federal habeas corpus has been held unavailable in cases of this type only where the grand jury discrimination claim has been foreclosed by a plea of guilty, *Tollett* v. *Henderson*, 411 U.S. 258 (1973), or the state prisoner has failed to comply with the state's procedural rules requiring challenges to the composition of the grand jury to be made prior to trial. *Francis* v. *Henderson*, 425 U.S. 536 (1976). Neither of those limitations applies in the instant case.

**B. Values Underlying The Fourteenth Amendment's Equal Protection Guarantee Militate Against Extension of The Rationale Of *Stone* v. *Powell* to Preclude Granting Federal Habeas Relief In Jury Discrimination Cases**

The State's argument that this Court's holding in *Stone* v. *Powell* should be extended to grand jury challenges raised in federal habeas corpus petitions fails to take account of the basic difference between the Fourteenth Amendment values implicated here and the evidentiary rule at issue in *Stone*. The starting point for the Court's analysis in *Stone* was its determination that the Fourth Amendment exclusionary rule is a judicially-created remedy designed to deter unconstitutional searches and seizures (428

[11] The fact that the grand jurors here were unaware of either respondents' or the victims' race (App. 31, 33) is therefore irrelevant.



U.S. at 482), rather than to correct a particular constitutional deprivation (*id.* at 486-487). The Court in *Stone* then weighed that deterrent purpose against the cost to society of reconsidering search-and-seizure claims of state prisoners on collateral review, where those claims have already been fully and fairly litigated in the state courts. 428 U.S. at 493-495.

In contrast to an unconstitutional invasion of privacy which cannot subsequently be corrected by the exclusion of the evidence thereby obtained (428 U.S. at 486), the constitutional violation here can be cured by dismissing the indictment returned by the tainted grand jury. The practice of invalidating convictions based on indictments returned by improperly constituted grand juries has for close to a century been the primary and almost exclusive mechanism for redressing the wrong not only to a given defendant, but also to the jury system and to the community at large where equal protection is denied in the selection of members of the grand jury. While the Fourteenth Amendment's equal protection guarantee can be secured to some extent by class actions such as those in *Carter* v. *Jury Commission*, 396 U.S. 320 (1970), and *Turner* v. *Fouche*, 396 U.S. 346 (1970), and by criminal prosecutions brought under 18 U.S.C. 243, the principal vehicle for eliminating discrimination in grand jury selection procedures remains the motion to quash or dismiss an indictment by a defendant who has been charged by that grand jury.

The Court in *Stone* expressly disavowed any intent to redefine the scope of federal habeas "for litigating constitutional claims generally" (428 U.S. at 495, n.37). If, despite this disavowal, this Court now concludes that an analysis similar to that utilized in *Stone* is appropriate here, the societal costs of correcting the constitutional deprivation suffered by these respondents do not, in our view, outweigh the values that are thereby vindicated.

While the state may be correct in describing the costs to it of having to reindict and retry respondents,[12] on the other side of the scale is a constitutional interest substantially more compelling than the questionable incremental deterrent effect of collateral application of the exclusionary rule at issue in *Stone* v. *Powell*. This Court has repeatedly recognized that more is at stake than a particular defendant's entitlement to equal protection where there is a showing of discrimination in the method by which grand jurors are chosen. A fundamental societal value embodied in the Fourteenth Amendment is impaired by such discrimination:

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[12] In at least one significant respect the "cost" to the state in having to reindict and retry respondents is less than it would be in the Fourth Amendment context. In the latter situation, the state would have to exclude evidence that might be highly probative on the issue of guilt because it was obtained in violation of the Fourth Amendment. The state suffers no such deprivation in the instant case, however. It is free to use again any and all evidence produced at respondents' first trial. It can even read the prior grand jury testimony to a new, properly constituted grand jury if its evidentiary rules permit.



> The very fact that colored people are singled out and expressly denied * * * all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.

*Strauder* v. *West Virginia*, 100 U.S. 303, 308 (1879). See also *Smith* v. *Texas*, 311 U.S. 128, 130 (1940). In addition, as this Court observed in *Taylor* v. *Louisiana*, 419 U.S. 522, 530 (1975), the exclusion of significant groups from jury service diminishes confidence in the administration of justice. In keeping with the importance of the values implicated in the Fourteenth Amendment's equal protection guarantee, this Court has described racial discrimination in jury selection procedures as being "at war with our basic concepts of a democratic society and a representative government," *Smith* v. *Texas*, *supra*, 311 U.S. at 130, "odious to our thought and our Constitution," *Brown* v. *Allen*, *supra*, 344 U.S. at 470, and injurious "to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." *Ballard* v. *United States*, 329 U.S. 187, 195 (1946). Where constitutional considerations of this magnitude are subjected to the weighing process applied in *Stone* v. *Powell*, the balance tips heavily in favor of continu-

ing to allow state prisoners to raise jury discrimination claims in petitions for federal habeas corpus.[13]

[13] There may also be significant differences between this case and *Stone* in the extent to which it is appropriate to rely on the state courts to vindicate the rights involved (428 U.S. at 493, n.35). The record here suggests that federal court review of this particular type of constitutional claim is not mere duplication of judicial effort. Respondents' challenges to the foreman selection procedures were initially heard and decided by the very judge whose appointments they contended were racially discriminatory (see *supra*, note 7); a ruling in respondents' favor would have amounted to an admission by the judge that his own method for choosing the grand jury foreman violated the Constitution.

Respondents fared little better on direct appeal. In 1973 in *Hale* v. *Henderson*, 485 F. 2d 266 (6th Cir.), the court of appeals addressed itself to the issue of racial discrimination in the appointment of grand jury foremen in Shelby County, Tennessee, where no black had ever been appointed by the circuit judge in 150 opportunities. While the court decided *Hale* on other grounds, it expressed substantial concern about appointment methods that resulted in 150 successive instances of white foremen being selected. 485 F. 2d at 269-270. Despite the discussion of this issue in *Hale*, the Tennessee Court of Criminal Appeals, considering respondents' grand jury claims just six months after *Hale* was decided, made no mention of the specific contention raised by respondents concerning selection of the foreman in briefly disposing of their grand jury claims (App. 38-39).



## II.

### A STATE PRISONER'S ENTITLEMENT TO FEDERAL HABEAS CORPUS WHERE HE HAS MADE AN UNREBUTTED PRIMA FACIE SHOWING OF DISCRIMINATORY JURY SELECTION PROCEDURES IS NOT CONTINGENT ON A DEMONSTRATION OF ACTUAL PREJUDICE

Since its decision in *Strauder* v. *West Virginia*, *supra*, holding that the Equal Protection Clause of the Fourteenth Amendment is violated by the systematic exclusion of persons from service on state grand juries or petit juries on racial grounds, this Court has never required a showing of actual prejudice by one asserting such a claim, whether on direct review or collateral attack, except in one situation.[14] The rationale for this policy is explained in *Hill* v. *Texas*, 316 U.S. 400, 406 (1942) (citation omitted):

> [N]o State is at liberty to impose upon one charged with crime a discrimination in its trial procedure which the Constitution, and an Act of Congress passed pursuant to the Constitution, alike forbid. Nor is this Court at liberty to

[14] A state prisoner seeking federal habeas corpus on grounds of alleged discrimination in the selection of the grand jury who has failed to comply with the state's procedural rule requiring such a claim to be made prior to trial must show cause for his failure to assert his rights in a timely fashion in the state proceedings, and he must also show actual prejudice. *Francis* v. *Henderson*, 425 U.S. 536 (1976). The same rule applies to federal prisoners who raise the claim on collateral attack after failing to comply with the requirements of Rule 12(b) of the Federal Rules of Criminal Procedure. *Davis* v. *United States*, 411 U.S. 233 (1973).

grant or withhold the benefits of equal protection, which the Constitution commands for all, merely as we may deem the defendant innocent or guilty. It is the State's function, not ours, to assess the evidence against a defendant. But it is our duty as well as the State's to see to it that throughout the procedure for bringing him to justice he shall enjoy the protection which the Constitution guarantees. Where, as in this case, timely objection has laid bare a discrimination in the selection of grand jurors, the conviction cannot stand, because the Constitution prohibits the procedure by which it was obtained. Equal protection of the laws is something more than an abstract right. It is a command which the State must respect, the benefits of which every person may demand. Not the least merit of our constitutional system is that its safeguards extend to all—the least deserving as well as the most virtuous.

Accord, *Eubanks* v. *Louisiana*, 356 U.S. 584 (1958); *Avery* v. *Georgia*, 345 U.S. 559 (1953); *Patton* v. *Mississippi*, 332 U.S. 463 (1947).

This Court's refusal to concern itself with questions of guilt or innocence in cases of this type reflects its recognition of the multiple interests served by the Equal Protection Clause—interests which are no less harmed by racial discrimination in the selection of a grand jury that indicts a guilty defendant than by such discrimination in the selection of a grand jury that indicts an innocent defendant.

These same considerations militate against application of the "harmless error" doctrine in grand jury



discrimination cases, a contention also advanced by the state (Pet. Br. 28-29). Where the composition of federal grand and petit juries was challenged in *Ballard* v. *United States*, *supra*, this Court stated that "reversible error does not depend on a showing of prejudice in an individual case." 329 U.S. at 195.[15] In this context, guarding against the conviction of the innocent through the use of improper jury selection methods is only one function of federal habeas corpus; application of the "harmless error" doctrine would leave unvindicated the other important Fourteenth Amendment values protected by the writ. Accordingly, a state prisoner's right to seek federal habeas corpus in a jury discrimination case should not depend on a showing of actual prejudice.

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[15] The inapplicability of the harmless error doctrine in this context is also noted by Mr. Justice Stewart, concurring in *Chapman* v. *California*, 386 U.S. 18, 44 (1967):

> In a long line of cases leading up to and including *Whitus* v. *Georgia*, 385 U.S. 545, it has never been suggested that reversal of convictions because of purposeful discrimination in the selection of grand and petit jurors turns on any showing of prejudice to the defendant.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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